MISSISSIPPI LAW JOURNAL

A Symposium on Workmen's Compensation Law

BASIC PRINCIPLES OF WORKMEN'S COMPENSATION
Douglass A. Campbell
THE MISSISSIPPI WORKMEN'S COMPENSATION ACT IN PROSPECT
Wex S. Malone
SOME PRACTICAL PROBLEMS UNDER THE MISSISSIPPI WORKMEN'S COMPENSATION ACT
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CONFLICT OF LAWS QUESTIONS IN WORKMEN'S COMPENSATION LAW
C. J. Otjen
ADMINISTRATION OF WORKMEN'S COMPENSATION
Walter F. Dodd

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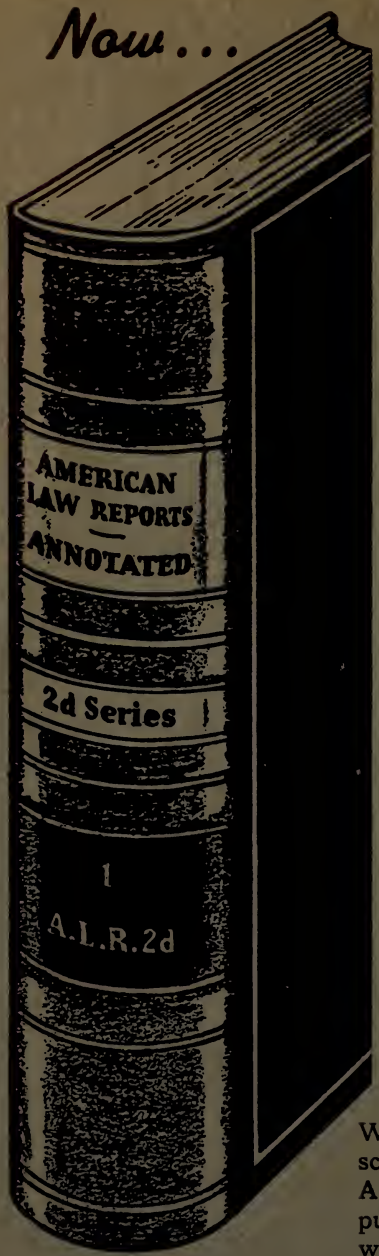

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LAW JOURNAL INDEX

The editors of the LAW JOURNAL plan the publication this year of a comprehensive index to Volumes 1 through 20 of the JOURNAL. This index, most of which has already been compiled by members of the JOURNAL staff, will include a table of all cases commented on in the JOURNAL.

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Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

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Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOL. XX MARCH, 1949 No. 2

FOREWORD

*Walter Dell Davis**

From the year 1884 in Germany, when the first accident insurance statute was enacted, to 1948 in Mississippi, the year of the enactment of a workmen's compensation law, is a long time. In about every session of the Mississippi Legislature for the past twenty years, some form of a workmen's compensation bill has been offered, but only within recent years has one been so much as dignified by committee approval. It remained for the regular 1948 session to see a workmen's compensation bill finally become law.

From the standpoint of an interested bystander only, the writer watched the passage of this bill, and is not fully acquainted with all the factors that determined its final passage. But from his varied experiences as a former legislator, one time Secretary of the State Senate, former practicing attorney, and as a close observer of all legislative matters, he is of the opinion that the ultimate passage of the compensation bill did not appear to be a result of the age-old cry for industry, nor the plea from certain elements of organized labor; but passage seemed to come rather from the calm workings of a vigorous and progressive State Legislature. This new law definitely bore all the aspects of a new front, in its initial appearance, its amendments, and its form on final passage. Many legislators who had in the past opposed a compensation law were able to vote for this measure because of its liberal features. Its only opposition appeared to be from those who were in utmost sincerity constitutionally opposed to the drastic changes brought about in our legal procedure.

As in all new laws, particularly where compromise is necessary for passage, certain ambiguities appear in Mississippi's Act. In a brief two months of operation, problems have arisen which are not answered by the Law. Although a majority are being interpreted by the Commission in a manner satisfactory to all parties, some questions must necessarily be determined by our highest court.

Particularly gratifying to the Commission is the information from the Rating Director of the Mississippi Insurance Commission that, in the total classifications in Mississippi, there is an actual reduction of some seven per cent in rates paid under workmen's compensation insurance as compared to employer's liability within the $5,000-$10,000 limits. Within the $10,-

*B.A., LL.B.; Chairman, Mississippi Workmen's Compensation Commission.

000-$20,000 limits of coverage, there has been an actual reduction of some nineteen per cent in rates paid by employers. This implies that in the majority of the types of business in Mississippi, workmen's compensation insurance is actually costing less in dollars and cents than in cases where the same employers were previously paying, or would have paid, for employer's liability insurance prior to the passage of the Act. Such a favorable situation as now exists does not imply that the rates now enjoyed will remain constant. In that instance, the employer's good or bad record of injuries will be the governing factor.

Thus far a vast majority of the people of Mississippi having contacts with the Commission seem pleased with the new law. This is true of workers and employers alike. However, the members of the Mississippi Workmen's Compensation Commission are well aware that the crucial period still lies ahead. We are convinced, however, that the present Law is workable, and with its fair and impartial administration the Act will prove to be a credit to the Legislature that enacted it, and a boon to the citizens of Mississippi for whom it was intended.

BASIC PRINCIPLES OF WORKMEN'S COMPENSATION*

*Douglass A. Campbell***

The Legislature of the State of Mississippi has outlined the statutory framework upon which its Workmen's Compensation Commission and judiciary must weave the pattern of the day-by-day application of the new concept of employer-employee relations. It is inevitable that situations will arise in which careful analysis is demanded if the jurisprudence of workmen's compensation as it grows in Mississippi is to attain its full stature undeformed by unwise bulging, restrictions, or distortion.

In spite of the variations in language, certain basic principles have evolved in the law of workmen's compensation as the firm philosophical foundation for the guidance of reasoning in equivocal situations and in interpreting ambiguous language. Diligent and persuasive counsel in the trial of individual cases will be tempted to suggest meanings in words which actually are foreign to the true spirit of workmen's compensation. As a yardstick by which to test the variety of their theories, a short summary of these principles is here presented.

Readjustments of Rights and Liabilities

The object of a compensation act is to effect a more humanitarian and economical system for financing the loss sustained by employees in the service of industry in place of the inadequate and, at times, unfair remedy provided by suits to be brought and disposed of in the courts. To do this in a practical and fair manner, it became necessary to readjust the rights and remedies of the parties as they were understood under the common law. Both employer and employee gained benefits and made concessions in this new legislation. It is in the nature of a compromise.[1]

Workmen's compensation was adopted with the deliberate purpose of abandoning common-law standards. It embodied a complete and exhaustive code to cover the entire field of compensation for injuries and deaths re-

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*Copyrighted by Douglass A. Campbell, February, 1949.

**A.B., M.S., J.D.; Referee, California Industrial Accident Commission; Lecturer, Extension Division, University of California; Member, California State Bar; Author, Workmen's Compensation, Its Principles, Practice and Insurance (1935).

[1]New York Central R. R. v. White, 243 U. S. 188 (1917); Chamberlain v. Florida Power Corp., 144 Fla. 719, 198 So. 486 (1940); Sweeting v. American Knife Co., 226 N. Y. 201, 123 N.E. 82 (1919). (In selecting cases for these footnotes, the author has deliberately chosen those from the federal courts, Arkansas, Florida, New York and Ohio whenever available, since their provisions seem to be most similar to the new Mississippi Act. Absence of reference to other jurisdictions does not mean, necessarily, that the rule is not there followed.)

sulting from industrial accidents. These laws are neither cumulative nor supplemental to the common-law remedies for either negligence or breach of contract. Old rights, duties, obligations and remedies were abolished for which were substituted entirely new ones. These are *sui juris*. They are completely substitutional and exclusive, designed to protect the public welfare in the light of industrial, social and economic experience. In undertaking to apply its many provisions, if the true intent and purpose of the legislation is to be carried out, the act itself and its underlying philosophies must serve for guidance.[2]

The rules of law applicable to workmen's compensation, so far as the act purports to cover the subject,[3] may validly differ from those applicable to litigation generally.[4] An act which meets the test of reasonableness in compensation as between the employee who receives and the employer who pays is one of the most socially beneficent enactments which statesmanship is capable of producing.[5]

Outline of a "Complete System" of Workmen's Compensation

While there are wide differences in the manner of the application and adoption between the various compensation acts, students and experienced practitioners in the field are generally agreed upon the rough outline which the basic legislation should assume. This has been incorporated into the authorizing provisions of the California State Constitution as follows:[6]

> * * * A complete system of Workmen's Compensation includes:
>
> (1) adequate provisions for the comfort, health, * * * and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party;
>
> (2) * * * full provision for securing safety in places of employment;

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[2]Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U. S. 493 (1939); Mobile & Ohio R. R. v. Industrial Commission, 28 F.2d 228 (E.D. Ill. 1936); Alaska Packers Ass'n v. Industrial Accident Commission, 294 U. S. 532 (1935); J. L. Williams & Sons v. Smith, 205 Ark. 604, 170 S.W.2d 82 (1943); Young v. Tarlton, 204 Ark. 283, 162 S.W.2d 477 (1942); Barrencotto v. Cocker Co., 266 N.Y. 139, 194 N.E. 61 (1934).

[3]Rosenfield v. Matthews, 201 Minn. 113, 275 N.W. 698 (1937).

[4]Rich v. Industrial Accident Commission, 36 Cal. App.2d 628, 98 P.2d 249 (1940).

[5]Rich Hill Coal Co. v. Bashore, 334 Pa. 449, 7 A.2d 302 (1939).

[6]Cal. Const. Art. XX, § 21.

(3) full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury;

(4) full provision for adequate insurance coverage against liability to pay or furnish compensation;

(5) full provision for regulating such insurance coverage in all its aspects including the establishment and management of a State Compensation Insurance Fund;

(6) full provision for otherwise securing the payment of compensation;

(7) * * * full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumberance of any character. * * *

Primary Responsibility for Injury Upon Industry

Workmen's compensation is a product of industrialism. It is founded upon the cardinal principle that industrial accidents are inevitable incidents of modern industry, and that the economic loss to the individual by these injuries in line of duty should be in part borne by industry as a whole rather than fall solely upon the employee and employer involved[7] or upon society.[8]

The employer assumes this as part of the cost of production. He protects himself against this hazard by insurance, the cost of which is cared for as are taxes, fire losses, depreciation of, or accident to, machinery and any other expense that ordinarily is paid for by the employer.[9]

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[7]Terminal Shipping Co. v. Branham, 47 F. Supp. 561 (E.D. Md. 1942), *aff'd* 136 F.2d 655 (C.C.A. 4th 1943); Berry v. Atlantic Greyhound Lines, 114 F.2d 255 (C.C.A. 4th 1940); Alaska Packers Ass'n v. Industrial Accident Commission, *supra* note 2; New York Central R. R. v. White, *supra* note 1; Duff Hotel Co. v. Ficara, 150 Fla. 442, 7 So.2d 790 (1942); Maryland Casualty Co. v. Sutherland, 125 Fla. 282 169 So. 679 (1936); Post v. Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351 (1916); State *ex rel.* Munding v. Industrial Commission, 92 Ohio St. 434, 111 N.E. 299 (1915).

[8]New York Central R. R. v. Winfield, 244 U. S. 147 (1917); New York Central R. R. v. White, *supra* note 1; C. F. Wheeler Co. v. Pullins, 152 Fla. 96, 11 So.2d 303 (1942); Adkins v. Staker, 130 Ohio St. 198, 198 N.E. 575 (1935).

[9]Baltimore & Philadelphia S. B. Co. v. Norton, 284 U.S. 408 (1932); Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917); New York Central R. R. v.

Since it is industry as a whole which is subject to the hazard, it is not unreasonable that it, and not merely such establishments as furnish the occasion for the individual accidents, should bear the burden. Unless undue compensation is paid, the burden upon industry is not excessive, particularly in view of conditions prior to the compensation acts.[10] A reasonable compensation for industrial accidents is a proper charge against industry, which passes it to the ultimate consumer as a part of the necessary cost of production.[11] This is not because the consumer is at fault for creating the demand whose supply produces the disabilities, but because a loss shared among many is less a loss than if borne by one.[12]

The advantage of putting first responsibility for industrial accidents upon industry is that, in the effort to reduce costs under the spur of competition, the lowering of the accident hazard is a logical step in the reduction of insurance costs, labor turn-over and lost time, thereby furthering the general social policy. The employer does not pay the charge. He merely advances it in the first instance and adds it to the selling price of his product.[13]

Negligence Immaterial

It was seen that no system of indemnity dependent upon the employer's fault would apply to many of the cases. In probably a majority of the cases of injury, there is no assignable fault, while in many more it is impossible of proof. Society needs such protection as much as the individual because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. Since accidents are a natural and, in part, inevitable concomitant of industry as now practiced, society which is served thereby should in some way provide the protection.[14]

Because the purpose of compensation legislation is to ameliorate a social condition, it was sought to establish a remedy which would be available for every injury sustained by a workman while engaged in industry. For this reason, these acts universally eliminate the question of fault of the

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White, *supra* note 1; Maryland Casualty Co. v. Sutherland, *supra* note 7; Post v. Burger & Gohlke, *supra* note 7; Prendergast v. Industrial Commission, 136 Ohio St. 535, 27 N.E.2d 235 (1940).

[10]Grain Handling Co. v. McManigal. 102 F.2d 464 (C.C.A.2d 1939), *cert, denied,* 308 U.S. 570 (1940); Mountain Timber Co. v. State of Washington, *supra* note 9; New York Central R. R. v. White, *supra* note 1.

[11]Cases cited *supra* note 10.

[12]Grain Handling Co. v. McManigal, *supra* note 10.

[13]Baltimore & Philadelphia S. B. Co. v. Norton, *supra* note 9; Jamison v. Encarnacion, 281 U.S. 635 (1929).

[14]Fidelity & Casualty Co. v. Burris, 59 F.2d 1042 (App. D.C. 1932); New York Central R. R. v. Winfield, *supra* note 8.

employer or the lack of care of the employee as a condition to owing or receiving their benefits,[15] except where: (1) the injury was caused by the intoxication of the employee or his wilful intention to injure or kill himself or another;[16] (2) the employee elects to sue an uninsured[17] or excluded and non-electing employer in a common-law action.[18]

It is not the purpose of the act to exculpate or absolve the employers from the consequences of their negligent conduct. The field of cases in which compensation is to be awarded was enlarged by the act so as to include accidents not directly attributable to negligence.[19]

Accident Prevention

A complete system of workmen's compensation includes adequate provision for securing safety in places of employment. Its soundest practice supplants concealment of fault in accidents by a spirit of frank study of causes, thereby eliminating accidents which are preventable and reducing cost of the plan and human suffering.

No mention is made in the Mississippi Act for inspectional staff and rule-making powers to secure safety in places of employment. Unless provision for this activity be elsewhere provided, the Mississippi system will be seriously handicapped by otherwise avoidable losses. It is cheaper and far better to prevent accidents, than to compensate for them afterwards!

Simple and Speedy Adjudication

The compensation act rests on the underlying notion that the common-law remedy by action involves intolerable delay and great economic waste, gives inadequate relief for loss and suffering, operates unequally as between different individuals in like circumstances, and that, whether viewed from the standpoint of the employer or employee, it is inequitable and unsuited to conditions of modern industry.[20] The fundamental reason for the enactment of this type of legislation is to avoid litigation, lessen the expense incident thereto, minimize appeals, afford an efficient tribunal wherein by a speedy mode of procedure injured workmen may secure prompt pay-

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[15]Terminal Shipping Co. v. Branham, *supra* note 7; Hartford Acc. & Ins. Co. v. Cardillo, 112 F.2d 11 (App. D.C. 1942), *cert. denied,* 310 U.S. 649 (1940); Cudahy Packing Co. Parramore, 263 U.S. 418 (1923).

[16]Miss. Laws 1948, c. 354, § § 4, 5.

[17]*Id.* § 5.

[18]*Id.* § 3.

[19]Tscheiller v. National Weaving Co., 214 N.C. 449, 199 S.E. 623 (1938); McNeely v. Carolina Asbestos Co., 206 N.C. 568, 174 S.E. 509 (1934).

[20]Cudahy Packing Co. v. Parramore, *supra* note 15; New York Central R. R. v. Winfield, *supra* note 8; McCamey v. Payer, 135 Ohio St. 660, 22 N.E.2d 126 (1939).

ment of compensation, yet furnish to all parties full legal protection of their respective rights.[21]

The aim of a well-conceived compensation system is to make the practice and procedure as simple as possible to "accomplish substantial justice in all cases, expeditiously, inexpensively and without encumbrance of any character." It contemplates a poor man's court, or *rusticum forum,* wherein a claimant may present a cause without the assistance of counsel. This requires that strict rules of pleading and practice should not be applied. To accomplish this objective, in some acts, the procedure is outlined in detail. Niceties of pleading and practice cannot be required in a system of adjustment where both the members of the agency and the parties are expected to be laymen without violating the spirit and purpose of the underlying legislation.[22] To prevent misapplication of underlying principles of law, the summary action by the commission is generally subject to limited and speedy review by the courts.[23]

The biggest gain resulting from the simplified administrative remedy is increased availability of remedy to those heretofore unable or fearful of attempting to secure enforcement of their claim for redress.[24] By minimizing litigation in compensaion matters, a further public purpose is served in the lessened burden on the taxpayers.[25]

There is a recognized distinction between common litigation and the administration of compensation laws, which is not considered "litigation" in any technical sense. A proceeding before the commission is not an "action" within the statutory definition. It is a special proceeding.[26]

Where an employee has alleged all facts within his knowledge, that is sufficient in a compensation case. The technical rules applicable to pleadings generally are not strictly enforced.[27] A claimant in such proceeding,

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[21]State Compensation Ins. Fund v. Pillsbury, 27 F. Supp. 852 (S.D. Cal. 1939); Jones v. Getty Oil Co., 92 F.2d 255 (C.C.A. 10th 1937); Arrow Stevedore Co. v. Pillsbury, 88 F.2d 446 (C.C.A. 9th 1937); McCamey v. Payer, *supra* note 20; Industrial Commission v. Weigandt, 102 Ohio St. 1, 130 N.E. 38 (1921).

[22]Stansfield v. Lykes Bros. S. S. Co., 124 F.2d 999 (C.C.A. 5th 1941); State Compensation Ins. Fund v. Pillsbury, *supra* note 21; Arrow Stevedore Co. v. Pillsbury, *supra* note 21; Kaplan v. Kaplan Mills, 248 N.Y. 10, 161 N.E. 204 (1928); Rhyner v. Hueber Bldg. Co., 171 App. Div. 56, 156 N.Y. Supp. 903 (1916).

[23]Woldberg v. Industrial Commission, 74 Utah 309, 279 P. 609 (1929); Consolidated Mining Co. v. Industrial Commission, 66 Utah 173, 240 P. 440 (1925); Fox Park Timber Co. v. Baker, 53 Wyo. 467, 84 P.2d 736 (1938); Shaul v. Colorado Fidelity & Ins. Co., 46 Wyo. 348, 26 P.2d 639 (1933).

[24]*See* DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 744 (1936).

[25]Shepard v. Carnation Milk Co., 220 Iowa 466, 262 N.W. 110 (1935); Flint v. City of Eldon, 191 Iowa 845, 183 N.W. 344 (1921); Pierce v. Bekins Van & Storage Co., 185 Iowa 1346, 172 N.W. 191 (1919).

[26]Sartin v. Moran-Buckner Co., 189 Okla. 178, 114 P.2d 938 (1941).

[27]Clark v. Alexandria Cooperage & Lumber Co., 157 La. 135, 102 So. 96 (1924); Pierre v. Barringer, 149 La. 71, 88 So. 691 (1921).

using forms prepared by the compensation authorities which did not fit the circumstances of his case, is nonetheless entitled to whatever relief is appropriate.[28]

Compensation for Loss of Support and Rehabilitation

A primary purpose of compensation legislation is to insure to the injured employee and to those dependent upon him an adequate means of subsistence while he is unable to work as a result of a compensable injury, and to bring about his recovery as soon as possible in order that he may be returned to the ranks of productive labor.[29]

By this means, industry seeks to absorb a part of the economic shock which invariably results from an industrial accident, rather than to respond for a legal wrong.[30] The act substitutes a compensatory income to the employee for loss of earning capacity due to an industrial injury proportioned to the loss of his earning power,[31] and gives to the dependents a substitute for the support they have lost.[32] To effectuate this policy, the act provides for frequent and regular payments,[33] and opposes payments in gross or in lump sum except in special circumstances.[34]

Indemnity is payable only where industrially produced disability is present. The theory of the law is to compensate the employee solely for disablement by reason of his injury.[35] Mississippi makes practical provision for rehabilitation in placing no limit upon the employer's liability for medical, surgical or hospital treatment, other than it be reasonably necessary to cure and relieve the effects of the injury.[36] In this regard it is in

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[28]Mancini v. Pennsylvania Rubber Co., 147 Pa. Super. 359, 24 A.2d 151 (1942).

[29]Moquin v. Industrial Accident Commission, 33 Cal. App.2d 511, 92 P.2d 413 (1939); Great Western Power Co. v. Industrial Accident Commission, 196 Cal. 593, 238 P. 662 (1925); Union Iron Works v. Industrial Accident Commission, 190 Cal. 33, 210 P. 410 (1922); Spreckles Sugar Co. v. Industrial Accident Commission, 188 Cal. 256, 199 P. 8 (1921); Maryland Casualty Co. v. Bartlett, 37 Ga. App. 777, 142 S.E. 189 (1928); Adkins v. Staker, *supra* note 8; State *ex rel.* Munding v. Industrial Accident Commission, *supra* note 7.

[30]Moquin v. Industrial Accident Commission, *supra* note 29; Holland v. Morley Button Co., 83. N.H. 482, 145 A. 142 (1929); Guay v. Brown Co., 83 N.H. 392, 142 A. 697 (1928).

[31]Koeppel v. E. I. DuPont de Nemours & Co., 37 Del. 369, 183 A. 516 (1936); Anderson v. Roberts-Karp Hotel Co., 171 Minn. 402, 214 N.W. 265 (1927); Cain v. Industrial Accident Commission, 149 Ore. 29, 37 P.2d 353 (1934).

[32]Empire Zinc Co. v. Industrial Commission, 102 Colo. 26, 77 P.2d 130 (1937); Frink Dairy Co. v. Industrial Commission, 78 Colo. 71, 239 P. 727 (1925); Texas Employers Ins. Ass'n v. Hamilton, 95 S.W.2d 767 (Tex. Civ. App. 1936); Maryland Casualty Co. v. Stevens, 55 S.W.2d 149 (Tex. Civ. App. 1932).

[33]Harrington v. Rhoads, 252 Mich. 87, 233 N.W. 361 (1930).

[34]Sunlight Coal Co. v. Industrial Commission, 350 Ill. 125, 182 N.E. 758 (1932); Sangamon City Motor Co. v. Industrial Commission, 315 Ill. 532, 146 N.E. 492 (1925).

[35]Phelps Dodge Corp. v. Industrial Commission, 46 Ariz. 162, 49 P.2d 391 (1935).

[36]Miss. Laws 1948, c. 354, § 7.

the forefront of the ranks of the more progressive acts. This provision in the long run does as much for the common good of the State as it does for the individual employees primarily benefited. Society's greatest asset, the health and efficiency of its workers, is thereby protected. It is better to cure and relieve industrial handicap than to attempt to compensate for it. The provision for a special subsistence allowance for those undergoing rehabilitation should give real impetus to this constructive salvage activity.[37] It represents industry's practical application of the Golden Rule, and the benevolent self-interest of the State.

Theory of Insurance

An injured employee is entitled to compensation for disability proximately caused by an industrial injury regardless of whether his condition at the time of such injury be supernormal, average or subnormal. The theory of compensation liability and insurance therefor is based upon the law of averages and the view that the employer accepts the employee subject to his condition of susceptibility, except in cases in which a pre-existing disease is aggravated by injury, in which event apportionment of liability is frequently expressly provided by statute.[38]

The principle of insurance or transfer of the employer's liability to a continually solvent debtor underlies all workmen's compensation laws in the various states,[39] the premium of which is contributed by the employers generally. The liability imposed upon the employer by a compulsory act, irrespective of his fault, is sustainable constitutionally only because protection is available to him in the form of insurance. Without this, it would be unconstitutional as an unreasonable and arbitrary exercise of the police power.[40]

In recognition of this need, most acts conventionally create a state compensation insurance fund to insure the existence of a source for this necessary insurance at reasonable rates. The Mississippi Act departs from the usual pattern in its silence in this respect.

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[37] *Id.* § 8(d).

[38] Grain Handling Co. v. McManigal, *supra* note 10; Hoage v. Employers' Liability Assurance Corp., 64 F.2d 715 (App. D.C. 1933), *cert. denied*, 290 U.S. 637 (1933); Pacific Employers Ins. Co. v. Pillsbury, 61 F.2d 101 (C.C.A. 9th 1932); Winthrop v. Industrial Accident Commission, 217 Cal. 351, 2 P.2d 142 (1931); Knock v. Industrial Accident Commission, 200 Cal. 456, 253 P. 712 (1927); Allen v. Maxwell Co., 152 Fla. 340, 11 So.2d 572 (1943); Rosichan v. Hoose, 40 Ohio App. 25, 177 N.E. 843 (1931).

[39] Bowen v. Hockley, 71 F.2d 781 (C.C.A. 4th 1934); Ward & Gow v. Krinsky, 259 U.S. 503 (1921); New York Central R. R. v. Winfield, *supra* note 8; Miller & Lux v. Industrial Accident Commission, 179 Cal. 764, 178 P. 960 (1919); Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398 (1915); Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556 (1916), *aff'd*, 249 U.S. 152 (1919).

[40] Western Indemnity Co. v. Pillsbury, *supra* note 39.

Theory of Status

Compulsory compensation legislation rests upon the idea of status and not upon that of express or implied contract as in the case of voluntary or elective acts.[41] In this respect it is analogous to the right to and liability for maintenance, cure and wages that long has existed between the seaman and his ship.[42] The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he is injured.[43] The statutory liability is added as an incident to the relationship of master and servant, not to the contract of hire.[44]

Certain of the acts are elective. By voluntary contract, the parties agree that the rights and remedies existing under the common law shall not operate as between them, and that, instead, the provisions of the compensation act as it may exist at the time of any injury shall govern their dealings. The terms of the act thus become an integral part of the contract of hire. In the absence of such an election the parties are not bound by the act.[45] Under an elective act, payments for an industrial injury are thus part of the consideration agreed to be paid for services rendered in the course of the employment.[46]

Liability under a compulsory act is in a class by itself. For want of a better term, it may be described as *"quasi ex contractu."*[47]

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[41]Bowen v. Hockley, *supra* note 39; Auerbach v. Industrial Commission, 54 F.2d 338 (C.C.A. 2d 1931); Cudahy Packing Co. v. Parramore, *supra* note 15; Western Indemnity Co. v. Pillsbury, *supra* note 39.

[42]*See* Aguilar v. Standard Oil Co., 318 U.S. 724 (1943); O'Donnell v. Great Lakes D. & D. Co., 318 U.S. 36 (1943); Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932).

[43]Pacific Employers Ins. Co. v. Pillsbury, 88 F.2d 443 (C.C.A. 9th 1937); Alaska Packers Ass'n v. Industrial Accident Commission, *supra* note 2; United States Casualty Co. v. Hoage, 77 F.2d 542 (App. D.C. 1935); Bradford Light Co. v. Clapper, 286 U.S. 145 (1932); Cudahy Packing Co. v. Parramore, *supra* note 15; North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 162 P. 93 (1916); Western Indemnity Co. v. Pillsbury, *supra note* 39; Cameron v. Ellis Construction Co., 252 N.Y. 394, 169 N.E. 622 (1930); Post v. Burger & Gohlke, *supra* note 7.

[44]Arizona Employers Liability Cases, 250 U.S. 400 (1919); New York Central R. R. v. White, *supra* note 1; Western Indemnity Co. v. Pillsbury, *supra* note 39.

[45]Union Oil Co. v. Hunt, 111 F.2d 269 (C.C.A. 9th 1940); Bradford Light Co. v. Clapper, *supra* note 43; Industrial Commission v. Nordenholt Corp., 259 U.S. 263 (1922); Hardware Mutual Casualty Co. v. Carlton, 151 Fla. 238, 9 So.2d 359 (1942); Chamberlain v. Florida Power Corp., *supra* note 1.

[46]Auerbach v. Industrial Commission, *supra* note 41; Doey v. C. P. Howland Co., 224 N.Y. 30, 120 N.E. 53 (1918).

[47]Alaska Packers Ass'n v. Industrial Accident Commission, 1 Cal.2d 250, 34 P.2d 716 (1934); Quong Ham Wah Co. v. Industrial Accident Commission, 184 Cal. 26, 192 P. 1021 (1920).

Liberal Construction

The compensation act is remedial legislation and is designed to furnish compensation benefits whenever employees suffer injury or death in the course of and because of their employment.[48] It is economic and sociological in nature rather than judicial, and is to be construed in character so as to fulfill its purpose.[49]

The act clearly modifies the common-law rules which previously existed. The rule generally followed in construing legislation which changes the common law is that it shall be strictly construed.[50] To prevent the application of this restrictive rule, many of the compensation acts contain provisions which specifically declare that the legislation shall be liberally construed. The Mississippi Legislature has not so spoken. However, the rule of liberal interpretation of compensation acts has become sufficiently integrated into American jurisprudence that its influence, rather than that of its predecessor, will probably guide judicial action. Under the Longshoremen's and Harbor Workers' Compensation Act, from which the Mississippi Act has borrowed freely, although the Congress has not included such a provision for liberal interpretation, the United States Supreme Court has made forceful declaration in favor of the new rule.[51]

It is a well established canon of judicial interpretation, that when legislation of one state is adopted by another, the courts of the latter state will give great weight to decisions of courts of last resort in the other state which interpret and declare the law's full scope at the time of its adoption.[52]

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[48]Union Lumber Co. v. Industrial Accident Commission, 12 Cal. App.2d 588, 55 P.2d 911 (1936); Davis v. W. T. Grant Co., 88 N.H. 204, 185 A. 889 (1936); Boody v. K & C Mfg. Co., 77 N.H. 208, 90 A. 859 (1914); Huntley v. Industrial Accident Commission, 138 Ore. 184, 6 P.2d 209 (1931); Lamm v. Silver Falls Timber Co., 133 Ore. 468, 277 P. 91, 286 P. 527, 291 P. 375 (1930).

[49]Carmichael v. Mahan Motor Co., 157 Tenn. 613, 11 S.W.2d 672 (1928).

[50]Hardware Mutual Casualty Co. v. Sprayberry, 195 Ga. 393, 25 S.E.2d 74 (1943); New Amsterdam Casuaity Co. v. Sumrell, 30 Ga. App. 682, 118 S.E. 786 (1923); Consolidated Coal Co. v. Patrick, 254 Ky. 671, 72 S.W.2d 51 (1934); Palmer v. Inhabitants, 133 Me. 337, 177 A.711 (1935); Monumental Printing Co. v. Edell, 163 Md. 551, 164 A. 171 (1933); Core Contracting Co., v. Schaeffer, 151 Md. 494, 135 A. 318 (1926); Clough & Molly v. Shilling, 149 Md. 189, 131 A. 343 (1925); Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N.E. 766 (1889); World Publishing Co. v. Deloe, 162 Okl. 28, 18 P.2d 1070 (1933); Broughey v. Mowry Grain Co., 61 R.I. 221, 200 A. 768 (1938); Bernier v. Narragansett Electric Co., 56 R.I. 438, 186 A. 479 (1936); Matthews v. Hardaway Contracting Co., 179 Tenn. 98, 163 S.W.2d 59 (1942); Griffith v. Raven Red Ash Coal Co., 179 Va. 790, 20 S.E.2d 530 (1942); State v. Central Vermont R. R., 81 Vt. 459, 71 A. 193 (1908). See Notes 93-95, 59 C.J. 1040.

[51]See *post* notes 54 & 57.

[52]Travelers Ins Co. v. Branham, 61 F. Supp. 637 (E.D. Pa. 1945); Case v. Pillsbury, 52 F. Supp. 882 (S.D. Cal. 1943); Twin Harbor Stevedoring & Tug Co. v. Marshall, 103 F.2d 513 (C.C.A. 9th 1939); Employers Liability Assurance Corp. v. Monahan, 91 F.2d 130 (C.C.A. 1st 1937); Metropolitan R. R. Co. v. Moore, 121 U. S. 1022 (1887).

By force of this rule, the federal courts have followed decisions of the New York courts declaring the full meaning and scope of the provisions borrowed from New York at the time the Longshoremen's Act was enacted by the Congress.[53]

It is almost universally agreed that the compensation act and its occupational disease supplements should not receive a narrow construction and that ambiguous or inconsistent language should be resolved to carry out, as far as reasonably practicable, the general humanitarian purposes for which they were enacted.[54] Harsh or incongruous results are to be avoided whenever possible,[55] nor should its beneficient purposes be thwarted by technical refinements or theoretical reasoning.[56]

Occasionally, courts will use language suggesting that the evidence should be liberally construed, and that any doubts regarding the right to compensation benefits should be resolved in favor of the right.[57] This would seem to be an over-statement of the legislative intent in directing liberal interpretation, as is frequently expressly done in the act, because such a rule abolishes the burden of proof of a right to compensation.[58] In the absence of an express statement in the act to that effect, the basic rule applied in all realms of juridical controversy operates to require that the claimant prove his right to compensation by substantial evidence.[59] The failure to include the presumptions in favor of compensability contained in

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[53]See *supra* note 52.

[54]F. H. McGraw & Co. v. Lowe, 52 F. Supp. 641 (S.D. N.Y. 1943), *aff'd* 145 F.2d 886 (C.C.A. 2d 1944); Baltimore & Philadelphia S.B. Co. v. Norton, *supra* note 9; Jamison v. Encarnacion, *supra* note 13; Herron Lumber Co. v. Neal, 205 Ark. 1093, 172 S.W.2d 252 (1943); Hunter v. Summerville, 205 Ark. 463, 169 S.W.2d 579 (1943); Mack Coal Co. v. Dill, 204 Ark. 407, 162 S.W.2d 906 (1942); C. F. Wheeler v. Pullins, *supra* note 7; Fidelity & Casualty Co. v. Moore, 143 Fla. 103, 196 So. 495 (1940); Atlantic Marine Boat Yard v. Daniel, 138 Fla. 864, 190 So. 612 (1939); DiDonata v. Rosenberg, 263 N.Y. 486, 189 N.E. 560 (1934), *affirming* 265 N.Y.S. 852, 238 App. Div. 693 (1933); Beach v. Velzy, 238 N.Y. 100, 143 N.E. 805 (1924); *In re* Petrie, 215 N.Y. 335, 109 N.E. 549 (1915); Kuehnl v. Industrial Commission, 136 Ohio St. 313, 25 N.E.2d 682 (1940); Humphries v. Wheeling Steel Corp., 132 Ohio St. 263, 7 N.E.2d 230 (1937); Industrial Commission v. Bartholome, 128 Ohio St. 113, 190 N.E. 193 (1934).

[55]Maryland Casualty Co. v. Cardillo, 107 F.2d 959 (App. D.C. 1939); Associated General Contractors of America v. Cardillo, 106 F.2d 327 (App. D.C. 1939); Baltimore & Philadelphia S.B. Co. v. Norton, *supra* note 9; Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940); Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939); Rudd v. Fair Forest Finishing Co., 189 S.C. 188, 200 S.E. 727 (1939).

[56]Atlantic Marine Boat Yard v. Daniel, *supra* note 54; Dann v. Town of Veteran, 5 N.Y.S.2d 997, 254 App. Div. 462 (1938).

[57]F. H. McGraw & Co. v. Lowe, *supra* note 54; Southern Pacific Co. v. Sheppeard, 112 F.2d 147 (C.C.A. 5th 1940); Hartford Acc. & Ins. Co. v. Cardillo, *supra* note 15; Herron Lumber Co. v. Neal, *supra* note 54.

[58]F. H. McGraw & Co. v. Lowe, *supra* note 54.

[59]Pate Stevedoring Co. v. Henderson, 44 F. Supp. 12 (S. D. Ala. 1942); Industrial Commission v. Lathrop, 52 Ohio App. 55, 2 N.E.2d 828 (1936).

the Longshoremen's Act, coupled with the absence of a direction for liberal interpretation, clearly indicates that it is the intent of the legislature in enacting the Mississippi Act that the claimant should fairly meet at least a reasonable burden of proof.

The act should not be amended by judicial construction upon attenuated theories of inclusion. Persons entitled to the benefits of the act should be favored by liberal interpretation of its provisions, but for this very reason they should be held to strict proof of their title as beneficiaries, and nothing can be presumed or inferred in this respect.[60]

The injunction to liberal interpretation will not permit a forced construction to be given to the language of the statute, nor can it be carried to the point of being bountiful with the money of others by applying the act to employments, persons, or situations not within its stated scope, intent or purpose, affording relief not granted by the law, nor permit the allowance of a claim that lacks some of the necessary elements required by the act itself.[61]

When the terms of a statute are plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing for the court to construe.[62] The object of interpretation should not be to promote injustice.[63] It should not be so liberal as to result in injustice to either side.[64] It is both futile and dangerous for a court to tamper with unmistakable language of a statute in order to achieve some imagined and undisclosed legislative purpose,[65] and, under the guise of construction, to write into it provisions which the legislature did not see fit to insert.[66] Liberal construction does not require nor authorize the frittering away of the written law.[67] To extend legislation beyond its intended field of operation, or to narrow its confines to less than that field, is to amend it.[68] Neither the compensation authorities nor the courts have the power to legislate.[69]

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[60]Glens Falls Indemnity Co. v. Henderson, 42 F. Supp. 528 (E.D. La. 1941).

[61]Pate Stevedoring Co. v. Henderson, *supra* note 59; Kobilkin v. Pillsbury, 103 F.2d 667 (C.C.A. 9th 1939), *cert. denied*, 309 U.S. 619 (1940); Sullivan Mining Co. v. Aschenbach, 33 F.2d 1 (C.C.A. 9th 1929); Leon County v. Sauls, 151 Fla. 171, 9 So.2d 461 (1942); DiDonato v. Rosenberg, *supra* note 54; Beach v. Velzy, *supra* note 54.

[62]Travelers Ins. Co. v. Norton, 34 F. Supp. 740 (E.D. Pa. 1940); Mobile & Ohio R. R. v. Industrial Commission, *supra* note 2; Lewis v. United States, 92 U.S. 618 (1875).

[63]*In re* Johnson's Estate, 98 Cal. 531, 33 P. 460 (1893).

[64]Los Angeles County v. Jones. 13 Cal.2d. 554, 90 P.2d 802 (1939); Mulville v. San Diego, 183 Cal. 734, 192 P. 702 (1920).

[65]Earl Ranch v. Industrial Accident Commission, 4 Cal.2d 767, 53 P.2d 154 (1935).

[66]Davis v. W. T. Grant Co., *supra* note 48.

[67]*In re* Jessup's Estate, 81 Cal. 408, 21 P. 976, 22 P. 742 (1899).

[68]Davis v. W. T. Grant Co., *supra* note 48.

[69]Trudenich v. Marshall, 34 F. Supp. 486 (E.D. Wash. 1940); Kobilkin v. Pillsbury, *supra* note 61.

The mandate of liberal interpretation does not mean that any strained construction of the law should be made or allowed for the purpose of permitting an exorbitant award solely for private gain. It should be considered as a direction that the language of such statute be given, freely and conscientiously, its commonly and generally accepted meaning to the end that the most comprehensive application thereof may be accorded without doing violence to any of its terms. The law should be so applied that a claimant will be considered within its terms if reasonably possible, but it should also be justly administered with equal equity to both the employer and the employee.[70]

The administration of the act must be fair to all parties. The employer has rights as well as the employed. Their rights stand upon an equality in the eyes of the law. All are entitled to the even-handed administration of justice and to the equal protection of the laws.[71]

Part of Loss Borne by Employee

The primary responsibility for industrial injury which rests upon the employer requires a reasonable degree of assistance to the injured man, but as the principle of negligence—of fault—has been discarded, likewise has the concept of damages. The purpose of workmen's compensation legislation is to rehabilitate, not indemnify. In order to reduce accident frequency and to prevent imposition by an employee who might otherwise be inclined deliberately to injure himself in order to secure the benefits provided if they be unduly large, the injured man himself is compelled to stand part of the resulting financial loss in several ways:[72] (1) By the waiting period;[73] (2) The injured workman receives only two-thirds of his actual wages, if they be within the statutory limits, and even less than that if he earns more than the maximum wage recognized by the act.[74] (3) Most acts contain provisions denying all benefits if the injury be proximately caused by the intoxication of the injured employee or be due to his wilful attempt to injure himself or another.[75] These are all instruments to carry out the principle that the employer's liability under the act shall be subject to definite limitations.[76]

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[70]American Mutual Life Ins. Co. v. Lowe, 13 F. Supp. 906 (D. N.J. 1936); Western Indemnity Co. v. Pillsbury, *supra* note 39.
[71]Chausse v. Lowe, 35 F. Supp. 1011 (E.D. N.Y. 1938).
[72]New York Central R. R. v. White, *supra* note 1.
[73]Miss. Laws 1948, c. 354, § 6.
[74]*Id.* § § 6, 8.
[75]*Id.* § 4.
[76]*Post* pp. 130-131.

By requiring that some part of the loss of industrial accidents shall fall upon the injured employee, and, in the event of his death, upon his dependents, a sound principle of indemnity insurance is applied—that a lively sense of self-interest shall be stimulated by making it to the employee's interest not to get hurt. Furthermore, a soundly administered act provides no indemnity for mere pain and suffering, unless it be present to a degree actually sufficient to produce an impairment of earning power.

Citizenship Ordinarily Immaterial

The citizenship or nationality of the injured workmen, for most compensation purposes, is immaterial. If he be injured while working in the State, or under a contract of employment entered into within it over which the State maintains jurisdiction,[77] the workman or his dependents, in the event of his industrial death, are entitled to the benefits provided by the act.[78] The only difference in benefits turning upon citizenship created by the Mississippi Act is in reference to death benefits payable to non-resident aliens, or those about to become non-residents. The relationships qualifying for these benefits in the latter case are restricted to a smaller group than is true of resident aliens, and, upon request of the carrier, in its discretion the Commission may commute the death benefit at four per cent compounded annually to a single lump sum payment.[79]

The commutation feature permits the carrier, should it so desire, to free itself from the administrative complications and expense which may be involved in attempting to transmit funds abroad. It further simplifies the problem of the dependents since many of them reside in areas in which banking facilities as we know them are non-existent or far distant. This discrimination does not violate treaty rights.[80]

Theory of Recovery

The purpose of the elimination of fault as the basis of indemnity is to secure to the industrially injured employee compensation benefits according to a scheduled rate of statutory payments, and to assure the employer that his liability therefor would be limited to that created by the act.[81] The

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[77]Miss. Laws 1948, c. 354, § 49.

[78]Madera Sugar Pine Co. v. Industrial Accident Commision, 262 U.S. 499 (1923); Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491 (1916).

[79]Miss. Laws 1948, c. 354, § 9(h).

[80]Maiorano v. Baltimore & Ohio R. R., 213 U.S. 268 (1909); Zancanelli v. Central Coal & Coke Co., 25 Wyo. 511, 173 P. 981 (1918). *See* Notes, 1917D L.R.A. 62, and 1918F L.R.A. 496.

[81]Travelers Ins. Co. v. Burden, 94 F.2d 880 (C.C.A. 5th 1938); New York Central R. R. v. White, *supra* note 1; Shoemaker v. Electric Autolite Co., 69 Ohio App. 169, 41 N.E.2d 433 (1942).

price paid by the employee for the speed and comparative certainty of recovering for industrial accidents under the compensation act irrespective of the question of negligence is a lower level of indemnification as contrasted with the possible size of verdicts in common-law actions based on negligence.[82]

By the mandate of liberal interpretation contained within most acts, it was the manifest purpose of the legislation to distribute a portion of the savings to the employer in a strong case of serious and compensable injury to the unfortunate employee whose case is weak but who is disabled nevertheless.[83]

Liability rests upon the employer for injuries sustained within the terms of the act, not only when they are not caused by his own wrongful act, but even when they result from the wrongful act of third persons. The purpose of the act was to make available promptly medical attention, hospitalization and compensation commensurate with the injury if received as a result of and in the course of the employment whether the employer, the employee or a third person was at fault.[84] Since the underlying principle is to charge industry only with its own wreckage,[85] the employer is entitled to be reimbursed for all his compensation disbursements on account of an industrial injury caused by the negligence of a third-party *tort-feasor* from any third-party recovery.[86]

Where the employer is subject to the act and has conformed to its requirements by insuring the payment of compensation, within the field covered by the statute, it represents the sole measure of his liability.[87] The former common-law and statutory remedies of an employee and his dependents against his employer are intact except in so far as the workmen's compensation act covers the field. All other rights are unchanged.[88]

Adjustment of Compensation

It is the manifest purpose of the act that compensation benefits should be adjusted from time to time as the disability increases or diminishes

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[82]Industrial Commission v. Schaefer Realty Co., 98 Colo. 445, 56 P.2d 51 (1936); Repka v. Fedders Co., 239 App. Div. 271, 267 N.Y. Supp. 709 (1933); Hall v. Industrial Commission, 52 Ohio App. 318, 3 N.E.2d 635 (1936).

[83]Lumbermen's Mutual Casualty Co. v. Griggs, 190 Ga. 277, 9 S.E.2d 84 (1940).

[84]Weathers for the Use of Ocean Accident & Guarantee Corp. v. Cauthen, 152 Fla. 240, 12 So.2d 294 (1943).

[85]*Supra* pp. 119-120.

[86]Baker & Conrad v. Chicago Heights Construction Co., 364 Ill. 386, 4 N.E.2d 953 (1936). Miss. Laws 1948, c. 354, § 30.

[87]*Id.* § 5.

[88]Clark v. Banner Grain Co., 195 Minn. 44, 61 N.W. 596 (1935); Donnelly v. Minneapolis Mfg. Co., 161 Minn. 240, 201 N.W. 305 (1924).

during the period for which compensation may be ordered paid.[89] To make this possible, the commission is given continuing jurisdiction over its cases with authority to modify its decisions based upon: (1) "change in conditions"; or (2) because "of a mistake in a determination of fact."[90] In all other respects, the determination of a compensation case, once it has become final, is *res judicata*. By this means, flexibility and simplicity of administration is attained with its added benefit of basic finality.

Public Interest

The compensation acts are fundamentally based upon the principle that there is a large element of public interest in accidents occurring from modern industrial conditions, to the end that the economic loss shall fall in the first instance upon industry rather than upon society. From this arises the generally present power of the commission to act of its own motion in situations requiring the protection of the awards involved.[91] In the administration of the act, the interests of the public, as well as those of the employer and employee, are to be considered.[92] And compensation acts in their final, logical development are compulsory on the part of those made subject to their terms.[93]

The whole design of the compensation act was to eliminate the complexities and technicalities of civil litigation by substituting a simple procedure whereby the injured workmen or his dependents could personally present the claim.[94] A specialized tribunal, staffed by subject-matter experts, was created to assist in the adjustment and adjudication of compensation claims which was to assume a large part of the responsibility for developing all facts necessary for the proper determination of each claim on its merits, stripped of all technicalities.[95]

The injured man was to bear a part of the cost of his injury,[96] since the employer's liability was limited[97] to an amount which represented the bare cost of the rehabilitation of the injured man and his family.[98] Society,

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[89]Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 265 P. 195 (1928).

[90]Miss. Laws 1948, c. 354, § 21.

[91]*See Id.* § § 7(a), 7(b), 8(c)(20), 8(d), 9(h), 9(i), 11, 12(h), 12(i), 12(j), 18, 19, 21, 22, 37(g), 44(6), 50.

[92]Mains v. J. E. Harris Co., 119 W. Va. 730, 197 S.E. 10 (1938).

[93]Bagnel v. Springfield Sand & Tile Co., 144 F.2d 65 (C.C.A. 1st 1944), *cert. denied*, 323 U.S. 735 (1944); Mattson v. Dept. of Labor & Industry, 293 U.S. 151 (1934); Smith v. Aerovane Utilities Corp., 259 N.Y. 126, 181 N.E. 72 (1932); Adkins v. Staker, *supra* note 8. Miss. Laws 1948, c. 354, § 3.

[94]*Supra* pp. 121-122.

[95]Miss. Laws 1948, c. 354, § 37(a).

[96]*Supra* pp. 129-130.

[97]*Supra* pp. 129 & 131.

[98]*Supra* p. 123.

for its own protection, placed this cost upon industry.[99] The whole purpose of the act would be defeated, to the public disadvantage, if material portions of this modest recovery of the injured man or of his dependents were to be diverted to other uses for which no loading or provision was made.[100]

Attorney's fees represent a diversion of the recovery from the injured workman or his family and were regarded as excessive in many cases under the older employer's liability litigation. For this reason compensation acts routinely provide for limitation upon and control of attorney's fees.[101]

PERMANENT DISABILITY RATING SCHEDULE

The following schematic table of schedule permanent disabilities is presented as a composite and simplified statement of the liabilities and rights incorporated into Section 7 of the Mississippi Act. The statutory provisions are much more complicated in application than a casual reading might suggest.

Loss, or Loss of Use of[1]	Number of Weeks of Indemnity
1. Arm—*At or above wrist*	
One	200[2]
Plus	
1 eye, or	
1 foot, or	
1 leg, or	
other hand	Lesser of: 450 or $8,600[3]
Both	Lesser of: 450 or $8,600[4]
—*Below wrist*	150[5]
2. Disfigurement —Serious facial or head	Equitably compensated in sum not to exceed $2,000[6]

[99] *Supra* pp. 119-120.
[100] Miss. Laws 1948, c. 354, § 16.
[101] *Id.* § 26.

[1] Miss. Laws 1948, c. 354, §§ 8(c)(18), 8(c)(19).
[2] *Id* §§ 8(c)(1), 8(c)(15).
[3] *Id.* § 8(a).
[4] *Ibid.*
[5] *Id.* §§ 8(c)(3), 8(c)(15).
[6] *Id.* § 8(c)(20).

Loss, or Loss of Use of[1]	Number of Weeks of Indemnity
3. Eye—One	100[7]
Plus	
1 arm, or	
1 foot, or	
1 hand, or	
1 leg	Lesser of: 450 or $8,600[8]
—Binocular vision	100[9]
—80% or more of vision	100[10]
—Less than 80% of vision	Proportioned to 100[11]
—Both	Lesser of: 450 or $8,600[12]
4. Finger—*Entire*	
1st or index	35[13]
2nd or middle	30[14]
3rd or ring	20[15]
4th or little	15[16]
Thumb	60[17]
—*Phalange*	
1st	Same as ½ of that finger[18]
More than one	Same as entire finger[19]
1 or more, of 2 or more fingers	Proportioned to 150[20]
—*Two or more fingers*	Proportioned to 150[21]

[7] *Id.* § 8(c)(5).
[8] *Id.* § 8(a).
[9] *Id.* §§ 8(c)(5), 8(c)(16).
[10] *Ibid.*
[11] *Id.* §§ 8(c)(5), 8(c)(16), 8(c)(19).
[12] *Id.* § 8(a).
[13] *Id.* § 8(c)(7).
[14] *Id.* § 8(c)(9).
[15] *Id.* § 8(c)(10).
[16] *Id.* § 8(c)(12).
[17] *Id.* § 8(c)(6).
[18] *Id.* § 8(c)(14).
[19] *Ibid.*
[20] *Id.* § § 8(c) (3), 8(c) (17), 8(c) (19).
[21] *Ibid.*

Loss, or Loss of Use of[1]	Number of Weeks of Indemnity
5. Foot—*Below ankle*	125[22]
Plus	
1 arm, or	
1 eye, or	
1 hand, or	
other leg	Lesser of: 450 or $8,600[23]
—*Both*	Lesser of: 450 or $8,600[24]
6. Hand—*Below wrist*	150[25]
Plus	
1 eye, or	
1 foot, or	
1 leg, or	
other arm	Lesser of: 450 or $8,600[26]
—*Both*	Lesser of: 450 or $8,600[27]
7. Hearing—*One ear*	
Total deafness	40[28]
Partial deafness	Proportioned to 40[29]
—*Both ears*	
Total deafness	150[30]
Partial deafness	Proportioned to 150[31]

[22] *Id.* § § 8(c) (4), 8(c) (15). Above ankle, See: LEG.
[23] *Id.* § 8(a).
[24] *Ibid.*
[25] *Id.* § § 8(c) (3), 8(c) (15). Above wrist, See: ARM.
[26] *Id.* § 8(a).
[27] *Ibid.*
[28] *Id.* § 8(c) (13).
[29] *Id.* § § 8(c) (13), 8(c) (19).
[30] *Id.* § 8(c) (13).
[31] *Id.* § § 8(c) (13), 8(c) (19).
[32] *Id.* § § 8(c) (2), 8(c) (15).
[33] *Id.* § § 8(c) (4), 8(c) (15).
[34] *Id.* § 8(a).
[35] *Ibid.*

Loss, or Loss of Use of[1]	Number of Weeks of Indemnity
8. Leg—*One*	
At or above ankle	175[32]
Below ankle	125[33]
Plus	
1 arm, or 1 eye, or 1 hand, or other foot	Lesser of: 450 or $8,600[34]
—*Both*	Lesser of: 450 or $8,600[35]
9. Multiple Schedule Losses	Cumulated not to exceed 450[36]
10. "Other Cases"	66⅔% of wage loss not to exceed 450 weeks[37]
11. Thumb—*One*	
Entire	60[38]
—*Phalange*	
First	30[39]
More than first	60[40]
—*Plus*	
1 or more fingers	Proportioned to 150[41]
12. Toe—*Great*	
Entire	30[42]
—*Other than great*	
Entire	10[43]
—*Phalange*	
1st	½ of entire toe[44]
More than first	Same as entire toe[45]
1 or more, of 2 or more	Proportioned to 125[46]
—*Two or more*	Proportioned to 125[47]

[36] *Id.* § § 8(c) (22), 31(a).
[37] *Id.* § 8(c) (21).
[38] *Id.* § 8(c) (6).
[39] *Id.* § § 8(c) (6), 8(c) (14).
[40] *Ibid.*
[41] *Id.* § § 8(c) (3), 8(c) (14), 8(c) (17).
[42] *Id.* § 8(c) (8).
[43] *Id.* § 8(c) (11).
[44] *Id.* § 8(c) (14).
[45] *Ibid.*
[46] *Id.* § § 8(c) (4), 8(c) (17), 8(c) (19).
[47] *Ibid.*

THE MISSISSIPPI WORKMEN'S COMPENSATION ACT IN PROSPECT

*Wex S. Malone**

Preface

The following pages are the substance of an address the writer delivered before a meeting of the Law Institute of the Junior Bar Association at Jackson, Mississippi, on November 19, 1948. My purpose was to discuss only in broad outline the types of problems with which the courts and lawyers of the State will be faced in the administration of the new Mississippi Workmen's Compensation Act. The material presented is familiar territory to all who have had experience in workmen's compensation, and the writer makes no pretense that anything novel or profound is included.

In annotating my remarks I have drawn largely from the Louisiana authorities; first, because these are more familiar to me, and second, because the Louisiana cases are readily available to Mississippi attorneys in the Southern Reporter. In most respects the problems discussed are common to all compensation acts everywhere, and the conclusions reached by the courts and commissions on these problems do not vary greatly from state to state.

When I faced the sobering realization that I was to receive the kick-off at this meeting, I began to worry about my lack of qualifications for the job. It is true that I have been working with compensation problems rather intensely for several years, but my experience has been entirely with our Louisiana Act which is administered by the courts rather than by an administrative tribunal. I feel that this is a major handicap in my efforts to be helpful today. Also, I hope that you will bear in mind that all compensation acts differ immensely from each other. W. R. Schneider, an attorney of St. Louis, Missouri, has attempted the job of preparing a comprehensive treatise on workmen's compensation covering the entire field. Even as capable a man as he has succeeded only in releasing eight ponderous volumes which do not begin to come to grips with the myriad differences between the various acts. So I beg your indulgence, if I am able to touch only a few high spots in the short time available this morning.

Purposes of Workmen's Compensation

When I first became interested in compensation and turned for help to the writers on the subject, I was much impressed by the great wailing

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and gnashing of teeth over the supposed fact that the cards of the common law had been stacked against employees in their damage suits against employers.[1] I read much about the unholy trinity of employer defenses as they were called—the doctrine of contributory negligence, assumption of risk, and the fellow servant rule. There was a time, of course, when these defenses had the effect of making it very difficult for an employee to recover against his employer, even though the employer may have been entirely blameworthy.[2] However, I feel that I am only bringing coals to New Castle when I tell you members of the Mississippi Bar that such a situation has not existed in this state for more than a half century.

Your Constitution of 1890 abolished both the fellow servant rule and the doctrine of assumed risk in all cases where a railroad was defendant.[3] And although a Mississippi Statute of 1896[4] which attempted to extend this state of the law so as to cover all employers was declared unconstitutional,[5] yet the Supreme Court of Mississippi has ingeniously worked out means of almost completely avoiding the fellow servant rule and the doctrine of assumed risk in all fields of employment. The duty of providing a safe place of work, the duty to work out a system of safe operations, the duty to instruct—all these were made non-delegable.[6] As a result, the fellow servant rule virtually disappeared. Assumption of risk never troubled your courts, and your comparative negligence statute[7] eliminated contributory negligence. So unless matters have changed substantially since the time when I used to mull over these matters with my friend George Butler and others whose faces decorate this audience, the employee-plaintiff has an excellent chance of getting to the jury, and he is receiving as good or better treatment at the hands of the Mississippi courts than the average stranger-plaintiff.

It seems fair to conclude that we cannot justify the adoption of a workmen's compensation act in Mississippi solely on the ground that it changes a body of supposedly bad torts law that had been less fair to workmen than to other claimants. The real reason for the adoption of the Act lies in the fact that the commonly accepted notion that liability must be based on fault does not work out in controversies between employers and employees.

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[1]Dodd, Administration of Workmen's Compensation 3 (1936).
[2]Veazey, *Master's Tort. Liability to Servant in Mississippi—Historical Background*, 12 Miss. L. J. 237 (1939).
[3]Miss. Const. § 193.
[4]Miss. Laws 1896, c. 87, p. 97.
[5]Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 34 So. 533 (1902).
[6]See the excellent discussion in Butler, *Master's Tort Liability to Servant in Mississippi—The Fellow Servant Rule*, 12 Miss. L. J. 243 (1939).
[7]Miss. Code Ann. § § 1454, 1455 (1942).

The injured employee is financially unable to support his own accident costs. The great bulk of industrial accidents are what we might call unavoidable. But they involve financial loss to someone just as much as though the employer were blameworthy. We do not escape the fact that the loss must be borne merely by refusing to hold the employer. When tort recovery is refused, the costs of the risk fall on the shoulders of the victim of the accident; we justify this by saying that the employer was not to blame; to which the employee may well reply, "Neither was I." The principle upon which compensation operates eliminates the notion of blame and substitutes instead the idea that the person who receives the products of the employer's business, whether it be goods or services, should pay the expectable cost of accidents in the production of those goods and services, just as he pays the other costs incident to the making of what he receives. The employer is only the conduit whereby this cost is initially absorbed and then passed on to the ultimate consumer in the form of a slightly increased charge. This means of course that the accident cost must be predictable so that it can be budgeted along with other production costs; and it must also be reasonable in amount so that it will not too drastically affect the market in which the employer operates.

Not only does the old requirement of fault serve to prevent a proper distribution of the costs of unavoidable injuries, it also presents other very serious disadvantages in the field of industrial accidents. Since the negligence law is uncertain in its operation, there is not likely to be a prompt settlement even where fault may be provable. The employer and employee are placed at odds with each other as they face litigation. Perhaps the employee will be dismissed and the little Christian gratuities which we might expect to be bestowed on one's injured employee will not be forthcoming. The loyalty of fellow workers will be placed under strain as it becomes obvious that they must testify in court. Although the amount eventually recovered may be generous even after contingent attorney fees have been deducted, yet it comes too late. Ten dollars at the time of accident may be worth a hundred dollars paid months or years later. Thus it seems fair to conclude that our traditional torts law is too slow, too cumbersome, too unpredictable in its operation, too hard on both employer and employee to be regarded as suitable in this kind of case. It is thought that it is better for the employee to be assured of a certain but small recovery which will be forthcoming immediately at the time it is most needed. The real purpose of compensation is to do just this.

The Compensation Act makes two basic changes in the existing law, and to these two changes everything else in the act is subordinate. The Act eliminates blameworthiness or fault, so that the employer is liable for

compensation for every accident that befalls his employee during the course of employment. Secondly, it substitutes compensation for damages. The injured workman, instead of receiving an indefinite sum to be set by the caprice of a jury for pain, suffering, shock, loss of opportunities, and fairly complete indemnity for loss of earning power, now is assured of a much more modest recovery in case of injury. First, he receives medical services and supplies including hospitalization according to Section 7 of the Act. The amount here is apparently unlimited except that it must be reasonable.

It is noteworthy that some of the compensation acts limit medical services to an arbitrary figure. In Louisiana, for example, the maximum allowable is $500.[8]

Secondly, the injured claimant is entitled to compensation based on an arbitrary percentage (66⅔%) of the average wage earned during the fifty-two weeks preceding the accident, as provided in Section 8. Section 10 sets forth the method for determining this average weekly wage. It is noteworthy that some discretion is vested in the Commission if the period during which the employee has worked for the employer is too short to work out a fair average. It may also be noted that food and housing furnished an employee are to be taken into consideration in fixing this average wage. A similar method of finding an average wage was originally provided in our Louisiana Workmen's Compensation Act, but it was found that the procedure was too cumbersome to be administered by a court, and we adopted instead the arbitrary practice of taking the hourly wage rate in effect between the employer and the employee *at the time of the accident,* whatever that might be.[9] This is multiplied by forty-eight to secure the weekly wage upon which compensation is based.[10] This rule affords a much rougher justice and it has not always been as simple to administer as was at first believed. It gave particular trouble in connection with workers who were employed on a part-time basis,[11] or who were hired only for a temporary job.[12] I believe your new system is fairer and your Commission should be able to administer it without too much difficulty.

You will note that the amount recoverable for loss of earnings is sharply limited in two other respects: the maximum period during which compensation is to be paid is arbitrarily set at 450 weeks, irrespective of the actual duration of disability. Also, and perhaps more important right now, is the arbitrary limitation in Section 6, Paragraph B, which imposes

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[8]La. Act 20 of 1914, as amended, § 8(5) [DART'S STAT. § 4398 (1939)].
[9]*Id.* § 8(3).
[10]Rylander v. T. Smith & Son, 177 La. 716, 149 So. 434 (1933).
[11]C. J. Durrett v. Unemployment Relief Committee, 152 So. 138 (La. App. 1934).
[12]King v. American Tank & Equipment Co., 144 So. 283 (La. App. 1932).

an arbitrary $25 per week maximum that can be recovered in any event. I shall return to the compensation scale in a little more detail later. It is enough to note that actual medical expenses and an arbitrarily limited sum for loss of earnings constitute the main elements of compensation and that the amount recoverable will be considerably less than in an action for damages. In passing, it may interest you to note that the limitations in your Act in this respect are in line with those imposed by other compensation acts.

You may ask why the amount is thus limited to a point that may be well below the actual damage suffered. Three reasons for this are usually advanced. First, as I have remarked, the employee is guaranteed some recovery in the event of every disabling accident—the compensation act is in effect a compromise, and the reduction in the amount the employee recovers is the price he pays for the privileges of subjecting the employer to liability without question of fault. Second, it is believed that by setting the compensation rate fairly low malingering will be discouraged. Finally, by arbitrarily establishing the amount of the claim it is hoped to eliminate disputes and thus encourage prompt settlement, which is one of the major objectives of the act. An arbitrary figure also assists in making the cost of the risk fairly predictable and thus facilitates the taking out of insurance at a reasonable premium.

Some Typical Problems under the Mississippi Act

Let us now look at some of the typical problems that are certain to be litigated under your new Act. You will note that it does not apply except where the relation of employer and employee exists between the defendant and the claimant. Under your negligence cases, proof of the employment relationship did not often give any difficulty. These cases were nearly always in the center of the road so far as the existence of employment was concerned, because there was no hope of proving negligence except where some instrument of the employment or some working facility or condition was defective or inadequate. This naturally presupposes the plaintiff was an employee. Also, at common law approximately the same duties that were owed to an employee were also owed to an independent contractor, or to any person who was rightfully at the place of the accident. Hence, doubts concerning the employment were not brought into sharp focus in these cases. Under the Act, however, you will find that there will be continuous argument as to whether or not the claimant was an employee of the defendant at the time of the accident. The plaintiff's status as an employee is the spring board from which he must launch his claim for compensation.

The Act tells us that an employer is any private person or concern who hires a minimum of eight persons, except non-profit charitable, fra-

ternal, cultural, or religious corporations.[13] The Act also excludes employers of domestic servants and farmers.[14] Farm help and domestic servants are generally excluded from compensation acts, but the exclusion of eleemosynary corporations is somewhat unusual. As the Mississippi Act is drawn, we may find the anomalous situation where an employing charity will be relieved of the burden of taking care of its own injured employees through compensation, only to force this obligation upon some other charity.

It is also noteworthy that the state, its political subdivisions, and municipal corporation are not included under the Act. This is in sharp contrast with our Louisiana Act. In Louisiana the only private employers who are covered by the act are those who are engaged in some hazardous business.[15] Public corporations, however, are included under the Act even though their functions may be entirely nonhazardous.[16] The idea followed was that the workmen's compensation scheme was a humane and beneficient procedure, and the state should point the way toward its universal use by subjecting itself fully to the compensation plan. It is my surmise that in Mississippi your legislature adopted the technical point of view and regarded workmen's compensation merely as a substitute for common law liability; hence public and charitable corporations which were not subject to common law suit were correspondingly exempted from compensation responsibility.

You will observe that the Compensation Act does not purport to cover the situation where an independent contractor claims compensation from his principal; hence you must expect the development of a rather elaborate body of law distinguishing the employee from the independent contractor in compensation cases. If the pattern develops here in Mississippi as it did in Louisiana, the cases in which this distinction will be fought hardest will be lumbering cases. It has been the practice in this section of the country for lumbering concerns to employ lumberjacks and haulers who work on a per-unit basis rather than for an hourly wage. These employees, who work alone in the open country, are subject to little or no direct supervision, and they are allowed considerable latitude as to when they do their work. In the case of lumber haulers these persons usually supply their own trucks and they hire and pay their own helpers. Factors like these induced our courts at first to classify lumberjacks and haulers as independent contractors who were not entitled to compensation.[17] Experience proved, however,

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[13]Miss. Laws 1948, c. 354, § 3(1).

[14]*Ibid.*

[15]Malone, *Hazardous Businesses and Employments under the Louisiana Workmen's Compensation Act*, 22 TULANE L. REV. 412 (1948).

[16]La. Act 20 of 1914, as amended, § 1(1) [DART'S STAT. § 4391 (1939)].

[17]Helton v. Tall Timber Lumber Co., 148 La. 180, 86 So. 729 (1920).

that these people, who do very dangerous work for a standardized wage, are not enterprisers in the sense that they are capable of bearing the cost of the risk of injury. They are usually dependent upon some one employer for a livelihood, and their situation falls within the spirit of the compensation act; hence our Supreme Court reversed its earlier position, and for many years it has classified lumberjacks and haulers, as well as their helpers, as employees of the mill or concern that hires them.[18]

It is to be noted that if a small lumber hauler who hires his own helpers is classified as an independent contractor in Mississippi, these helpers will also be deprived of the benefits of workmen's compensation. The hauler is likely to be a small operator who will be uninsured. If the lumber company is regarded merely as a principal, it will not be liable to these helpers according to the language of Paragraph 3 of Section 4 of your Act.

This section makes a *contractor liable* for compensation to the *employees* of a *subcontractor,* but it does not make a principal who is engaged in his own business liable to the employees of his independent contractor. I can not but regard this as a serious shortcoming in your Act, because it makes it possible for any employer to evade compensation liability simply by interposing a financially irresponsible contractor between himself and those who do his work, and it is to be expected that many enterprises engaged in such industries as lumbering and oil development will promptly resort to this procedure in connection with integral parts of their work. In order to meet this situation your Court and Commission may tend to be very liberal in regarding a claimant as an employee rather than an independent contractor. Many compensation acts have a classification known as a statutory employer. This is any person or concern which contracts out a part of its regular business operations, and the statutory employer is subject to liability just as though he had hired the plaintiff directly.[19]

If the claimant is an employee, it makes no difference whether he is regularly hired by the defendant and is on his payroll or whether he is only an occasional worker who operates under some informal arrangement. Some acts expressly exclude what are known as casual employees.[20] The Mississippi Act does not.

The problem of the borrowed employee is likely to arise early in the course of your litigation. It has generally been held that if *A* lends or leases his employee out to *B* for *B*'s work, then *B,* the borrower, rather

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[18]Bell v. Albert Hensen Lumber Co., 151 La. 824, 92 So. 350 (1922).

[19]*See,* for example, La. Act 20 of 1914, as amended, § 6 [DART'S STAT. § 4396 (1939)]

[20]HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 187 (1944).

than *A*, the lender, must bear the compensation cost in the event of an accident.[21] Sometimes it may be difficult to determine whether *A* has merely loaned his employee to *B* or whether *A* is in fact an independent contractor whose employee is doing a job that *A* had contracted to perform for *B*. If the latter situation exists, *A*, of course, and not *B*, will be liable for compensation.

If it can be said that the claimant is an employee of the defendant, the next question arises: Was he hired to do work that is a part of the regular business of the employer? There is nothing in the Mississippi Act specifically requiring that the work be a part of the employer's regular business. Suppose, for example, an industrial plant has a need for repairs to its building or its equipment. It hires a special worker to do this. Is this company liable in compensation if the worker is injured? Many acts require that the work done must be a part of the regular business of the employer, and in the situation that I have described the courts have tended to hold that the making of major repairs and the doing of construction work on the buildings of the enterprise are not part of its regular business unless the enterprise is engaged regularly in construction or repair work. Our Louisiana Court, for example, have held that a real estate company which owns and rents houses is not liable for compensation to employees who are hired to make routine repairs on these structures.[22] Such a company, says the court, is not engaged in the construction or repair business; hence the doing of this work is not included under this Act. In view of the language of your Act the Mississippi decisions may take a different turn.

If it is found that the claimant is an employee of the defendant in a business covered by the Act, the next question to arise is whether the injury was *accidental*. Some compensation acts include disabilities brought about by industrial or occupational diseases.[23] Paragraph 2 of Section 2 of the Mississippi Act covers only injury or death which is the result of accident. What then is an accident? The most obvious case, of course, is a simple traumatic injury resulting from a blow or a fall. This will make up the bulk of your cases. However, external violence in the commonly accepted sense of that term is not required. Injuries by strain are included, and you will note that your Act contains a special provision for hernia in Section 8, Paragraph F. In the same way, Caissen disease, or "bends" is

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[21]Sadler v. May Bros., 185 So. 81 (La. App. 1938).

[22]McAllister v. Peoples Homestead & Savings Ass'n, 171 So. 130 (La., App. 1936); *but cf.* Wood v. Peoples Homestead & Savings Ass'n, 177 So. 466 (La. App. 1937).

[23]See the interesting discussion in Cole, *Occupational Disease Coverage under Workmen's Compensation*, 6 LA. L. REV. 85 (1944).

covered. Likewise, heat prostration, sunstroke, frostbite, heart attack, and even sudden blindness or deafness attributable to the employment, as well as pneumonia which arose from exposure during working hours, have all been classified as accidents with fair regularity by courts and commissions.[24] In the cases of heart attack it is usually necessary to trace the disability to some single event which occurred during the course of employment, rather than to a gradual wear and tear on the heart.[25] In fact, the term *suddenness* has played a substantial part in distinguishing those injuries which are compensable as accidents from those which are merely occupational diseases. It has been held for example that acute lead poisoning, which can be attributed to a single exposure to lead fumes, constitutes an accident,[26] while chronic lead poisoning which is the result of regular daily exposure is merely an occupational disease not compensable under an act such as yours.[27] A similar approach has been taken to dermatitis and pneumonia.[28]

The fact that an injury is bacterial in origin has not prevented its being classified as an accident. This is obvious in cases where germs infect an otherwise trivial wound and produce disability. Even the contracting of smallpox, anthrax, scarlet fever, and the like, have been included if conditions conducive to such diseases prevail in the work and the disability can be traced to a definite event or occasion during the employment.[29]

The distinction between disabilities produced by a single event and therefore accidental and those produced by wear and tear and which are therefore occupational diseases has been productive of much confusion, and has given rise to difficult problems in connection with posture disabilities, exposure to X-ray and poisonous substances and gases, paralysis of any member from continuous physical manipulations, arthritis, strain and the like. The modern tendency in the cases is decidedly toward a liberal attitude, and a continuous series of physical strains or blows which finally break down the resistance is likely to be regarded as accidental.

In this connection it is important to bear in mind that a worker will not be denied his right to compensation because it is shown that prior illness or misfortune has made him more susceptible to accident than would be true of an ordinarily healthy employee. An employee, for example, who has a case of syphilis or locometer ataxia can recover for full disability if the disease is reactivated by a blow that would be harmless to a healthy

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[24] HOROVITZ, *op. cit. supra* note 20, at 82.

[25] *Compare* Wright v. Louisiana Ice & Utilities Co., 138 So. 450 (La. App. 1931) *with* Lynn v. Arkansas Fuel Oil Co., 192 So. 764 (La. App. 1939).

[26] Cannella v. Gulf Refining Co., 154 So. 406 (La. App. 1934).

[27] *Ibid. Cf.* Cole, *supra* note 23, at 85.

[28] HOROVITZ, *op. cit. supra* note 20, at 76.

[29] *Ibid.*

worker.[30] Cumulative disabilities are a little different, and are specially provided for by Section 31, which I am afraid we do not have time to discuss.

There is another feature of Paragraph 2 of Section 2 that deserves more attention than we can give. The accident must occur *during the course of employment* and also it must *arise out of the employment*. The reason for this restriction is clear. There is no intention to subject the employer to complete health and accident insurance for the benefit of his employees. The two terms, *during the course of* and *arising out of*, are often confused and the modern liberal tendency is to merge them. But in theory the two notions are different.

The requirement that the accident must occur during the course of employment is a legal means of restricting recovery to accidents that happen during the working day and to exclude those accidents that occur while the employee is about his private affairs. It is under this term that we must deal with accidents that happen while the employee is on his way to or from work, while he is resting, taking his meals, or catering to his own needs during working hours. In other words, we are asking the question: When can it be said that the employee is on the job? What does "the working day" include?

It is not necessary that the worker be actively engaged in his duties in order to have compensation. Accidents during permitted rest periods, or while the employee is standing around, are all considered within the course of employment.[31] Most courts hold that accidents occuring during the noon-lunch period are similarly covered if the employee is eating at his place of work.[32] However, accidents that occur at home during the lunch hour are generally excluded,[33] and this is sometimes true of injuries that happen while the employee is at a public eating place. It has been held, however, that where an employee who normally takes his lunch at home is forced by his duties occasionally to lunch near his place of work, he is acting in the course of his employment if he is injured while so engaged.[34] The present liberal trend is to include accidents that happen on the employer's premises prior to and following working hours. This, however, is not always true where the employee has lingered on the premises for an unreasonable time after his duties have ended.

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[30]*See,* for example, Fox v. United Chemical Co., 147 La. 865, 86 So. 311 (1920).
[31]Horovitz, *op. cit. supra* note 20, at 112.
[32]*Ibid.*
[33]Thibodeaux v. Young Lee Oil Co., 128 So. 709 (La. App. 1930).
[34]Neyland v. Maryland Casualty Co., 28 So.2d 351 (La. App. 1946).

The place of the accident is important when the injury was occasioned while the employee was going to or coming from work. It is generally held that the employee is not protected until he has reached the place of his work.[35] If, however, the route to or from the job is more dangerous than conditions of travel generally, the risk may be covered. Where, for example, a factory is established nearby to a railroad which must be crossed by workers going to and from their jobs, an injury inflicted when a worker is struck by a train might very likely be included.[36] If the employer provided means of transportation to and from the job, it is nearly always held that the employee who is injured while availing himself of this service can recover compensation.[37] There are infinite variations on all this, of course. It has also been held that where the employee has some material duty to perform for his employer after reaching home he is covered on the trip back from work and even after he has reached his own dwelling.[38] Special rules are necessary to cover the employees whose duties force them to travel or to establish special living quarters on or near the employer's premises. Injuries of all sorts in lumber camps, for example, have been covered by compensation. It has even been held that a traveling salesman who was injured when the hotel where he was temporarily residing was destroyed by fire was entitled to his compensation;[39] and car accidents in which traveling employees were injured are a frequent source of compensation litigation.[40] Employees injured at sporting events or outings sponsored by the employer may have difficulty in showing this accident occurred during the course of employment.[41]

It is generally said that it is not enough that the accident occurred *during the course of the employment.* It must be shown further that the accident *arose out of the employment.* This latter requirement has given rise to considerable difficulty whenever it has been considered. The term "arising out of" bears about the same relationship to workmen's compensation that the term "proximate cause" bears to the law of negligence. There has grown up the idea that workmen's compensation applies only to risks which can be peculiarly associated with employment, and if the risk is not of this kind, it is not to be covered by the act. We have seen that the term "in the course of employment" is used to assist us in answering the question, "When and where did the accident happen?" The term "arising out of

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[35]Thomas v. Shippers Compress & Warehouse Co., 158 So. 859 (La. App. 1935).
[36]Walker v. Lykes Bros.—Ripley S. S. Co., 166 So. 624 (La. App. 1936).
[37]Neyland v. Maryland Casualty Co., *supra* note 34.
[38]Pitre v. Louisiana Highway Commission, 161 So. 894 (La. App. 1935).
[39]Harivel v. Hall-Thompson Co., 98 Conn. 753, 120 A. 603 (1923).
[40]Crews v. Levitan Smart Shops, 171 So. 608 (La. App. 1937).
[41]Whittemore Bros. v. DeGrandpre, 30 So.2d 896 (Miss. 1947). *See* cases collected in Note, 115 A.L.R. 993.

the employment" is the means whereby we pose the question, "What *kind of a risk* brought about the accident?" The same question might be put by asking whether the employment was the proximate cause of the injury. The problem is equally difficult irrespective of how it is posed.

Many risks, such as the risk of injury by the machinery or tools of employment, are obviously covered. Similarly, injuries brought about by fatigue or overexertion or by the peculiarly dangerous conditions of the working place are included. Injuries from contaminated food or drink, or from exploding beverage bottles fall within coverage.[42] In fact, the cases where the court is likely to launch into the difficulties of the "arising out of" rule can be classified under a fairly small number of headings.

First we might consider accidents brought about by the forces of nature. The risk of frostbite, sunstroke, lightning, windstorm or exposure has been variously treated. If the employee's duties required that he be peculiarly or continuously exposed to the elements, he can recover for frostbite, sunstroke or exposure, while these employees whose duties require no more contact with the elements than is to be found in the normal course of living might be excluded from compensation by a conservative court. In the case of lightning and tornado, these explosions of nature show no favoritism between the employed and the unemployed; but it has been held that persons whose duties require that they be in the open or near steel structures might be allowed compensation for injury by lightning[43] while those who work indoors might not so be treated.[44] One court has suggested that an employee who was injured when a part of a structure on which he was working fell during the course of a tornado could have compensation, although the same might not be true if he had been struck by some foreign object disconnected with his employment.[45] This kind of distinction-drawing has produced much confusion, and it is doubtful that it has been of any benefit to the course of justice. Yet the compensation opinions in many jurisdictions are filled with such stuff. The modern tendency is to treat all accidents resulting from natural phenomena as arising out of the employment.

Street accidents have given their share of trouble. If an employee does work which requires his regular presence on the streets or highways, he will have little difficulty in establishing the casual connection between the accident and his employment. This applies to delivery men, traveling

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[42]St. Alexandre v. Texas Co., 28 So.2d 385 (La. App. 1946).

[43]Gasca v. Texas Pipe Line Co., 2 La. App. 483 (1925).

[44]*See* cases collected in Notes: 73 A.L.R. 977; 40 A.L.R. 400; 46 A.L.R. 1218; 53 A.L.R. 1084; 83 A.L.R. 234.

[45]Harvey v. Caddo DeSoto Cotton Oil Co., 199 La. 720, 6 So.2d 747 (1942).

employees, street workers, and those who are in other similar occupations.[46] However, an office worker or factory employee whose job only occasionally requires that he be exposed to traffic perils may have some trouble in establishing his case before a literal minded court.

Perhaps the area in which the term "arising out of" has given most trouble has been in connection with personal assaults and horse-play. Many courts recognize that when the conditions of work require healthy male animals to be in close proximity to each other, they will engage in horse-play and frolic which bring about an injury. This is an expectable part of the working day. Therefore, accidents of this kind will be treated as arising out of the employment. Particularly will this be true if some tool or instrument of the employers was used to bring about the accident.[47] Thus, so long as the claimant was not the aggressor, he will probably recover. If, however, the claimant started the monkey business by a jocular attack, there is a tendency to bar recovery on the ground that the accident arose out of his own willful intention to injure another person. Section 4, Paragraph 1 of your Act is similar to other compensation statutes in this respect. Some courts have said that provisions of this kind should be limited to cases that involve serious assaults and affrays and should not bar recovery in the horse-play cases.[48]

In the case where an employee is injured by an intentional violent assault perpetrated by another, the right to compensation may be determined by the cause of the difficulty. If the fight arose out of some incident of the employment, recovery is generally allowed.[49] If, however, the affray was caused by personal dispute or animosity, the cases are in confusion. In one Louisiana case the complainant and other workers were employed in a lumber camp and lived on the premises. The complainant was shot during working hours as the result of a feud with a fellow employee over a woman. Compensation was allowed on the notion that living conditions dictated by the nature of the work would naturally give rise to antagonisms of this sort; hence the accident arose out of the employment.[50] But the limited language of Paragraph 2 of Section 2 of your Mississippi Act may force a less liberal attitude on this point in this State. As we have already noted, in cases of affrays it is essential that the claimant show that he was not the aggressor. Common law doctrines of self-defense, excessive force, with-

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[46]*See* cases collected in Notes: 8 A.L.R. 935; 23 A.L.R. 403; 29 A.L.R. 120; 36 A.L.R. 474.

[47]Horovitz, *Assaults and Horseplay under Workmen's Compensation Laws,* 12 Law Soc'y J. 179 (1946).

[48]*Ibid.*

[49]Guderian v. Sterling Sugar & Ry. Co., 151 La. 59, 91 So. 546 (1922).

[50]Keyhea v. Woodward-Walker Lumber Co., 147 So. 830 (La. App. 1933).

drawal, etc., are used freely in these situations. If the accident happened during the course of the employment, there is little to be gained by asking what are employment risks and what are not. Many courts are admitting that the entire problem of "arising out of" is a useless quibble which is producing confusion and embarrassment without purpose.[51] I, for one, hope your courts will be practical and liberal on this matter.

You will note that whether or not the employee was at fault in bringing about the accident is a matter that is wholly unimportant in compensation cases except in the limited situations described in Section 4. It makes no difference that he was careless, that he encountered an obvious danger, or violated some safety rule. Some courts have gone so far as to hold that even fraudulent misrepresentations made by the employee in order to secure his job are not a bar to his claim for compensation.

When we return to the types of disability listed in Section 8, I find it very difficult to be helpful to you, because of the fact that our Louisiana Courts have so completely renovated the part of our act that corresponds to your Section 8 that its language is virtually meaningless; hence I can only guess at what the Mississippi Court and Commission might do. You will note that disabilities are divided into four groups: permanent total disability, temporary total disability, permanent partial disability, and temporary partial disability. Although your Act gives numerous examples of permanent partial disability and also a few examples of permanent total disability, nevertheless, nowhere does it define the term, total disability. I understand that the general definition of total disability means complete lack of ability to do any work of a reasonable character. In other words, the totally disabled man is virtually bedridden. I am convinced that something like this was uppermost in the minds of your legislators, because they have classified the loss of a leg and even complete deafness as being only partial disability to be paid out according to the strictly limited schedule in Paragraph C of Section 8.

It might interest you to know that the Louisiana Courts have been extremely liberal in defining total disability. If an employee is unable to do the same kind of work that he was doing prior to injury, he is regarded as totally disabled, and he will be entitled to the maximum compensation allowed under our Louisiana Act, although he may be making as much or more after the accident doing a slightly different kind of work.[52] Our

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[51]Harvey v. Caddo DeSoto Cotton Oil Co., *supra* note 45.

[52]Knispel v. Gulf States Utilities, 174 La. 401, 141 So. 9 (1932); Ranatza v. Higgins Industries, 208 La. 198, 23 So.2d 45 (1945) (Carpenter who was earning $65 per week at time of accident was thought able to earn $35 weekly as bus driver, held totally disabled).

courts have further held that an employee may be totally disabled although he can do precisely the same work after the accident, provided only that it is shown that the doing of this work is painful to him. The schedule of listed disabilities in our Act, which is very similar to yours, is resorted to in Louisiana only on the rare occasion where there is no provable disability according to our liberal definition of that term. I presume, however, that your legislature intended that the great bulk of industrial accidents should be classified as bringing about only a partial disability covered by one of the twenty-two subdivisions of Paragraph C of Section 8. In case of injury of almost any type, there will likely be a temporary period of hospitalization which will fall under Paragraph B of this section.

The schedule of payments to be made in case of accidental death which are set forth in Section 9 is so arranged that the employer can not be held for more than 65% of the wage being paid at the time of death, irrespective of the number of dependents who might survive. This is the same percentage paid in non-fatal accidents. The wife and children are placed in a preferred class in the sense that, if their needs exhaust the maximum allowable, there will be nothing left for dependent brothers, sisters, or parents.

The term, widow, is liberally defined in Paragraph 14 of Section 2. She is entitled to only 35% of the average wage of deceased. "Widow" apparently includes a common law wife, which is very important in the case of negro workers. It is not necessary that she was living with the deceased at the time of his death provided that she was separated for justifiable cause or was deserted. It is noteworthy that in the case of the widow or child under the age of fifteen years, dependency is presumed. You will also note that acknowledged illegitimate children are included if they can show they were dependent upon deceased. I assume that in their case there is no presumption of dependency. Our Louisiana Act is not so liberal with respect to illegitimate children and common law wives. The former are entitled to compensation only if there is no other claimant,[53] while common law wives are not recognized in Louisiana and a dependent concubine has been denied recovery under our Act.[54]

Parents, grandchildren, brothers, and sisters must prove that they were in fact dependent on the deceased. Your Act does not make it clear whether or not a showing of partial dependency may be sufficient, except in the cases of married children or married brothers or sisters. These latter must show that they were *wholly* dependent under the language of Para-

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[53]Thompson v. Vestal Lumber & Mfg. Co., 208 La. 83, 22 So.2d 842 (1945).
[54]Moore v. Capital Glass & Supply Co., 25 So.2d 248 (La. App. 1946).

graph 12 of Section 2. Many compensation acts provide for partial dependency and allow compensation in such cases on a rough pro rata basis.[55] I cannot guess as to how your courts will handle the case of the partially dependent parent or unmarried brother or sister.

If a claimant must show dependency, how will he prove this? The Act tells us only that all questions of dependency shall be determined as of the time of injury. Is it sufficient if it is shown that there is a need for support and a reasonable expectancy that support will be forthcoming? Or must proof be made of some actual contribution by the deceased to the alleged dependent person? And if contributions must be shown, how much in the way of a contribution is required? Our Louisiana Act has been amended several times on this matter.

Some Suggestions and Conclusions

Time has prevented me from mentioning matters of procedure and the one-year statutory period of limitation. I have not discussed the right of employers who have paid compensation to seek reimbursement from any tort-feasor who may have been responsible in fact for the accident. Likewise untouched are the matters of attorney's fees, the compromising of disputed claims, the requirement of notice, and the prescribed waiting period.

In closing I might mention that in Louisiana there have been about 3,000 reported workmen's compensation cases which have been heard by our appellate courts and our Supreme Court. The certainty of prompt settlement which was one of the chief objects of the Act has not been achieved in our State. A large number of claims have been disputed and settled by compromise, with the result that the employee has received only a part of what the act might have allowed him.[56] This likelihood of compromise is one of the most unhappy outgrowths of a court administered act. I hope your commission procedure will avoid it for the sake of all parties concerned. There is considerable delay in the hearing of contested cases in Louisiana, and I would guess that in appealed cases an average of two years lapses between date of injury and final settlement. Will this be avoided under your commission procedure? The fact that your Act permits an appeal to the circuit court on both law and fact may not be very encouraging for the prospect either of prompt settlement or of moderate

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[55]La. Act 20 of 1914, as amended, § 8(2) [Dart's Stat. § 4398 (1939)]

[56]The Louisiana Court, after sanctioning the practice of compromise for many years, reversed its position in 1941 and interpreted the Act as not authorizing the practice. Puncher v. Employer's Liability Assurance Corp., 198 La. 921, 5 So.2d 288 (1941). Immediately thereafter the Act was amended so as to permit compromise. La. Act 96 of 1942.

litigation costs. However, the attitude of your Supreme Court toward findings of fact made by commissions has been very liberal in the past, and we can reasonably hope that this attitude will be manifested toward the findings of your new Workmen's Compensation Commission.

A vast and complex new area of law is opened to the Mississippi Bench and Bar. You will find that the success of your Act from a humanitarian viewpoint will depend to a large extent upon the Christian impulses of your Commission and courts and on their realization that too much legalism in the past has been the greatest handicap in the path of an intelligent administration of workmen's compensation acts. Common sense and the desire to fullfil the beneficent purposes of this legislation are certain to redound to the great credit of the law in Mississippi on this subject. Your Act can be a success if you are determined to profit by the mistakes which have been made in other jurisdictions.

SOME PRACTICAL PROBLEMS UNDER THE MISSISSIPPI WORKMEN'S COMPENSATION ACT

*William R. Schneider**

The Mississippi Workmen's Compensation Act[1] will be criticized by some opposed to the workmen's compensation principle. That principle has been criticized in each of the forty-seven other states. The comments will run about as follows:

> It is but a further manifestation of the socialistic 'welfare state' originated in Germany by Bismarck and carried forward in varying degrees by other leaders in other countries. It, and its related cradle-to-the-grave social care activities, will in due time bankrupt any state and its supporting society. History so proves. It is a departure from the political philosophy that made this country great. It is a deception of the worker. Where he might formerly obtain as much as $10,000 to $15,000 for the loss of an arm, the Workmen's Compensation Act contains a limitation of $5000 for the loss of an arm, plus a maximum of $25 per week for the healing period or period of temporary incapacity. The employee should be entitled to select his own doctor, etc., etc.

Why should the consumers of the product the worker helps to make expect the worker to subsidize them to the amount or extent of the wage loss the worker sustains through the inevitable industrial, accidental injuries he suffers in his work, whether the injury result from his own momentary inadvertance or carelessness, from the act of a third party or fellow employee, from the negligence of the employer, or from some accident for which no one is to blame? The common-law damage-suit system in which the worker was able to recover in only those thirty to forty per cent of the industrial accidents in which he could prove the employer at fault was as much a manifestation of the welfare state as is the present requirement that the property of certain landlords be excluded from our free enterprise system and the tenant be subsidized by the landlord to the extent of the loss sustained by such exclusion.

While it is true that under the common law system the worker would often obtain more for the loss of his arm or other injuries, even after the deduction of the usual attorney's fee and litigation expense, the workers under the Act now receive compensation also in those sixty to seventy per

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[1]Miss. Laws 1948, c. 354.

cent of the industrial injuries for which they formerly received nothing. Hence what the worker now receives under the Act averages more than what he obtained under the common-law damage suit system, and in most cases he receives his compensation during his period of disability when he needs it most rather than at the end of a protracted litigation, which in too many cases resulted in no recovery for the injured worker.

Experience has proved that to permit the employee to select his own or any physician he chooses and at the employer's or insurer's expense, produces, on the average, a result that is unsatisfactory to everyone except the physician. The present provision is unsatisfactory to most of the physicians, though it has proven in all but a negligible percentage of cases the most satisfactory to those most concerned, first the employee and second the employer.[2] It is to the employer's, as well as the employee's financial advantage to provide the worker the medical, surgical and hospital service that will most quickly and permanently restore the injured employee to the ranks of the full-pay, producing workers. The employer and insurer by reason of their greater experience are much more likely to have and maintain contact with that type of service than is the worker.

Other criticisms might be offered and answered to the satisfaction of some, but not to all. But the Mississippi Act has been adopted. In all likelihood it will remain, as such acts have in all other states. Before discussing it in some detail, I conclude, after comparing it with the other American acts and their interpretations, that it omits less that is desirable in a workmen's compensation act than does any other American statute. That statement is as comprehensive as I can make it. Those who drafted the Statute had the advantage of careful study of and experience with the operation of and interpretation of the other American compensation legislation. The Mississippi Act gives less cause for confusion and court interpretation because its drafters have largely avoided the pitfalls which experience in other states have disclosed. This does not mean, however, an absence of appeals to the courts. There will be plenty.

A claimant under the Act has arrived. Many questions must be asked. To one not too familiar with this statute and the interpretations of similar provisions of others, the following may not appear too elementary:

Are you employed by an employer who "had in service eight or more workmen or operatives regularly in the same business or in or about the same establishment?"[3]

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[2] *Id.* § 7.
[3] *Id.* § 3.

The word regular as used in the acts is used as an antonym of casual.[4] It is not synonymous with constancy.[5] It connotes some uniformity in the practice of the employment of more than a stated number of employees,[6] and covers such period of time as is reasonable under the circumstances.[7] It has been held that an employer may at some time have less than the required number of employees and still be under the act or more than the required number and not be under the act when such situation is temporary or does not bespeak a regularity or uniformity or a practice of the business.[8] Excluded employments such as domestic servants and farm laborers may not be counted in determining the jurisdictional number.[9]

Are you a domestic servant?[10] I have elsewhere said that a chauffeur and general utility man performing the work of a domestic servant when injured was not a domestic servant,[11] nor is a hotel maid,[12] nor a cook employed in a boarding house.[13] The term does not extend to workmen exclusively employed outside the house.[14]

Are you a farm laborer?[15] An employee of a threshing machine operator going from farm to farm threshing is not a farm laborer.[16] One employed solely to dig a ditch to make farm land more suitable for cultivation is a farm laborer and excluded from the benefits of the Act.[17] A fruit picker and packer has been held a farm worker.[18] A farm laborer, injured while driving a tractor from one field to another and who for a few weeks each year operated a cotton gin, did not lose his status of farm laborer.[19]

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[4]Barlow v. Shawnee Investment Co., 229 Mo. App. 51, 48 S.W.2d 35 (1932).
[5]Employers Liability Assurance Corp. v. Hunter, 184 Ga. 196, 190 S.E. 598 (1937).
[6]LaCroix v. Frechette, 50 R.I. 90, 145 A. 314 (1929).
[7]Jenkins v. Richert, 125 Conn. 258, 5 A.2d 6 (1939).
[8]Vandergriff v. Shepard, 30 Ga. App. 791, 148 S.E. 596 (1929).
[9]Chandler v. Harris, 47 Ga. App. 535, 171 S.E. 174 (1935). *See* 2 SCHNEIDER, WORKMEN'S COMPENSATION 96 & 573-607 (3d ed. 1942).
[10]Geary v. Martin, 101 Pa. Super. 311 (1931).
[11]Miss. Laws 1948, c. 354, § 3.
[12]Crockett v. Industrial Accident Commission, 190 Cal. 583, 213 P. 969 (1923).
[13]Comaskey v. Coleman, 3 Cal. Ind. Acc. Comm'n 95.
[14]Wakefield v. State, 41 Tex. 556 (1874). *See* 2 SCHNEIDER, *op. cit. supra* note 9 at 610-615.
[15]Miss. Laws 1948, c. 354, § 3.
[16]Industrial Commission v. Shadowen, 68 Colo. 69, 187 P. 926 (1920).
[17]Culpepper v. White, 52 Ga. App. 147, 160 S.E. 701 (1931).
[18]Kendall v. McBirney, 52 Idaho 65, 11 P.2d 370 (1932).
[19]Williams v. Westdale Corp., 3 So.2d 684 (La. App. 1941). *See* 2 SCHNEIDER, *op. cit. supra* note 9 at 608-657.

Are you an employee of a non-profit, charitable, cultural or religious corporation or association which has not accepted the Act?[20] Or has it complied with all the necessary requirements of acceptance?[21] If not, you are not under the Act, according to Section 3(1).

Are you an interstate truck driver? If so, you are under the Act.[22]

Are you an employee of a railroad, any part of whose duties is in furtherance of interstate or foreign commerce? If so you are excluded from the coverage of the Act.[23] But if you were injured through no negligence of the railroad, you may come under it.[24]

Are you a longshoreman or were you working on any navigable river barge or boat when you were injured? If so, you were probably not under the coverage of the Mississippi Act.[25] There are exceptions.[26]

Were you injured on Federal Government territory within the state such as a war plant, post office, etc., and you are not a Federal Government employee? If so, you are nevertheless under the coverage of the Mississippi Act.[27]

Were you injured while directing a blow at a fellow worker or supervisory employee who was unwarrantedly interfering with your work? If so, you were not under the Act if you were the aggressor.[28] But you are under it if you were striking the blow in self-defense as a result of a controversy arising out of your work in which the other was the aggressor.[29]

You were injured while driving a garbage removal truck for the City of Jackson. Under Section 2(5) of the Act defining "employer," a political subdivision is apparently not included.[30]

Some of the other workers at the plant were indulging in horseplay in which you took no part and you were injured. (a) Was such horseplay customary? (b) Was it contrary to the employer's rule, and was the rule

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[20]Miss. Laws 1948, c. 354, § 3.

[21]Hope v. Barnes Hospital, 227 Mo. App. 1055, 55 S.W.2d 319 (1932). *See* 3 SCHNEIDER, WORKMEN'S COMPENSATION 58 (3d ed. 1943).

[22]Anslow v. Spring, 272 App. Div. 1091, 74 N.Y. Supp.2d 782 (1947). *See* 2 SCHNEIDER, *op. cit. supra* note 9 at 3.

[23]*See* 2 SCHNEIDER, *op. cit. supra* note 9 at 38-85.

[24]Southern Pacific Co. v. Industrial Accident Commission, 113 P.2d 763 (Cal. App. 1941).

[25]*See* 2 SCHNEIDER, *op. cit. supra* note 9 at 7-38.

[26]Madderns v. Fox Film Co., 205 App. Div. 791, 200 N.Y. Supp. 344 (1923). *See* 2 SCHNEIDER, *op. cit. supra* note 9 at 20-38.

[27]2 SCHNEIDER, *op. cit. supra* note 9 at 87.

[28]6 SCHNEIDER, WORKMEN'S COMPENSATION 179 (3d ed. 1948).

[29]Verschleiser v. Joseph Stern Son, Inc., 229 N.Y. 192, 128 N.E. 126 (1920). *See* 6 SCHNEIDER, *op. cit. supra* note 28 at 155.

[30]2 SCHNEIDER, *op. cit. supra* note 9 at 276-350.

enforced? On the answers to these questions, as well as to which of the conflicting lines of decisions the Mississippi courts will follow, depends the problem of whether you will be entitled to compensation.[31]

You were injured playing ball at the annual company picnic. Whether you are entitled to compensation is contingent on a variety of conditions.[32]

You were tired and permitted the hitchhiker to drive, and he had an accident in which you were injured. You may be entitled to compensation. It depends upon a number of factors.[33] While the Act does not mention serious and willful misconduct or violation of reasonable rules of the employer as do most statutes, the question nevertheless remains: Were you injured by an accident which arose out of and in the course of your employment? Or had you temporarily stepped out of the course of your employment when you permitted the hitchhiker to take the wheel while you decided to take a nap?[34]

You say you were injured by the private automobile of your foreman driven into your employer's grounds in a careless manner. Whether he carries insurance or not, he may be liable for common law damages as a third person,[35] and you may also recover compensation, though you must reimburse the employer out of any damage-action recovery for compensation paid you by your employer. But if the man you say was your foreman was actually the superintendent or manager of your employer's plant, you may not recover damages from him as a third party.[36]

You say you were driving your own truck and also owned a second truck driven by a man you hired, but the company you hauled for controlled the result as well as the details of your work and that of your driver. Then you were both employees of the company and entitled to compensation when injured in this accident which arose out of and in the course of your employment.[37]

You were a salesman selling on a commission basis in whatever territory you chose, and the company exercised no control over you except to

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[31]6 SCHNEIDER, *op. cit. supra* note 28 at 558-583.
[32]6 *id.* at 519.
[33]6 *id.* at 451.
[34]6 *id.* at 1.
[35]Churchill v. Stephens, 91 N.J. Law 195, 102 A. 657 (1917). *But see* 3 SCHNEIDER, *op. cit. supra* note 21 at 166 & 212. *See also* Miss. Laws 1948, c. 354, § 30.
[36]Perry v. Beverage, 121 Wash. 652, 214 P. 146 (1923); Landrum v. Middaugh, 117 Ohio 608, 160 N.E. 691 (1927).
[37]North Alabama Motor Express v. Whiteside, 169 So. 335 (Ala. App. 1936); Southern Underwriters v. Samanie, 130 S.W.2d 1090 (Tex. Civ. App. 1939). *See* 3 SCHNEIDER, *op. cit. supra* note 21 at 124, and 4 SCHNEIDER, WORKMEN'S COMPENSATION 1 & 164 (3d ed. 1944).

write you occasionally to suggest that you see certain prospects. Then you were an independent contractor and not covered by the Act when injured.[38]

You married your husband after he received his fatal injury, and you had a child by him. Then neither you nor the child are entitled to death benefits, because you were not his dependents at the time he received the fatal injury, according to Section 9(g) of the Act. But if you read Section 1(14), a widow includes decedent's wife "living with or dependent for support upon him at the time of death." This would indicate that according to Section 9(g) you are the widow, but not dependent, though as a matter of fact you are dependent. So here we seem to have a question for the Supreme Court of Mississippi.[39]

While the Mississippi Act, unlike most statutes, does not say that a widow's compensation shall cease on her remarriage or when she inherits a substantial sum or income after her husband's death or fatal injury, Section 1(18) leaves it to the employer to overcome the presumption of dependency by the preponderance of the evidence. This also opens the gate for a prospective husband, who looks forward to the help he expects to give his prospective wife in the matter of spending her death benefits. Experience has demonstrated the wisdom of stopping compensation payments on remarriage.

You contracted lead poisoning as a result of using a paint spray for three days. That is certainly an injury to you under Section 4 of the Act. But Section 1(2) defines injury to mean "accidental injury". Can an accident happen all day, or all of three days? It has been held that it may.[40] But in New York it is designated an occupational disease, and therefore not compensable under an act which compensates only for industrial accidents.[41] In another case[42] the court said:

> Whether his suffocation resulted from breathing such air for several hours, or the inflowing air from the other room for several minutes, the event happened "suddenly and violently" as contra-distinguished from occupational disease * * * the injury was referable to a definite time, place and circumstances.

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[38]Badger Furniture Co. v. Industrial Commission, 200 Wis. 127, 227 N.W. 288 (1929); Robinson v. Meredith Publishing Co., 232 Iowa 885, 6 N.W.2d 288 (1942); 4 SCHNEIDER, *op. cit. supra* note 37 at 156.

[39]*See* 9 SCHNEIDER, WORKMEN'S COMPENSATION (3d ed. 1949), which is devoted exclusively to "Dependency" and which will be published soon.

[40]Industrial Commission v. Ule, 97 Colo. 253, 48 P.2d 803 (1935).

[41]Horton v. Demeree & Son, 262 N.Y. 658, 188 N.E. 109 (1933). *See* 3 SCHNEIDER, *op. cit. supra* note 21 at 487, and 4 SCHNEIDER, *op. cit. supra* note 37 at 387.

[42]New River Coal Co. v. Files, 215 Ala. 64, 109 So. 360 (1926).

It was held a compensable accident. But injury to the eyes from looking at fire for three days while firing a boiler was held not accidental.[43]

Your employer informs you that he was not insured and that he had not obtained permission to carry his own risk. Then you may claim compensation, or sue him for damages, and the employer cannot plead the common law defenses.[44] The fact that you are a minor unlawfully employed does not remove you from the coverage of the Act and does not entitle you to sue for damages.[45] Yet suppose your employer is now insolvent, and his insurance company claims its policy provides that it does not cover illegal employments. Section 33 of the Act states:

> Such contract [policy] shall be construed to grant full coverage of all liability of the assured under and according to the provisions of the act, notwithstanding any agreement of the parties to the contrary, * * *[46]

You were overcome by sunstroke or heartstroke. It is not compensable, unless there is something connected with the employment that contributed to the injury—something that causes you to be more exposed to the danger than the people of the community generally.[47]

You were struck by lightning while you were in the course of your employment. You may recover compensation if the nature of your work required you to be at a place where you were more susceptible to being struck by lightning than the people of the community generally.[48]

You almost died from the sting of a wasp or the bite of a wood tick. The rule of recovery in such case is the same as in lightning cases mentioned above. Did the work expose you to that danger more than the people of the community generally?[49]

You were helping to lift a 500-pound bale of cotton and the strain caused you to suffer a hernia. You did not slip or fall; there was nothing unusual that occurred other than the hernia. You were doing the work precisely the same as you had done it hundreds of times before. Are you entitled to compensation? Yes. The Act does not require an accident in hernia cases.[50]

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[43]Chalfant v. Arens, 167 Ore. 249, 120 P.2d 219 (1941).

[44]Miss. Laws 1948, c. 354, § 5. *See* 1 SCHNEIDER, WORKMEN'S COMPENSATION 219 (3d ed. 1941).

[45]Miss. Laws 1948, c. 354, § 1(4).

[46]*See* 4 SCHNEIDER, *op. cit. supra* note 37. § 1177(e).

[47]Fidelity & Casualty Co. v. Industrial Commission, 59 F.2d 1042 (App. D. C. 1932). *See* 5 SCHNEIDER, WORKMEN'S COMPENSATION 422 (3d ed. 1946).

[48]Alzina Construction Co. v. Industrial Commission, 387 Ill. 484, 56 N.E.2d 786 (1944). *See* 6 SCHNEIDER, *op. cit. supra* note 28 at 49 & 78.

[49]*See* 5 SCHNEIDER, *op. cit. supra* note 47 at 222.

[50]5 *id.* at 577 & 573-814.

So you have traumatic, chronic, progressive adhesive tenosynovitis from operating a roller sander from June 21 to July 2, and your hands have become so stiff you cannot close them.[51] In New Jersey you would be entitled to compensation, and very likely in many other states.

While travelling for your employer in Arizona and the San Joaquin Valley in California, where many people have coccidioidal granuloma, you contracted that disease. In California you may recover.[52]

Your husband, as a traveling salesman, went to South Africa for his employer, where he contracted malignant terian malaria and died of it. Since there is no proof that he contracted it while at work rather than while sleeping or playing tennis, death benefits must be denied, the New York Court said originally. However, there was a strong dissenting opinion, and on further review by the Court of Appeals the decision was reversed and compensation granted.[53]

Splendidly drafted though it is, the foregoing will indicate that the Mississippi Workmen's Compensation Act will nevertheless require many appeals to the courts to ascertain which of two or three well settled (in different jurisdictions) but conflicting views of many problems will finally be accepted by the Supreme Court of Mississippi. Let us remember that is no fault of the Statute or its drafters. If the latter had tried to foresee every problem and had made the law too specific, it is manifest that only unnecessary confusion would have resulted.

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[51] 5 *id.* at 573.

[52] Pacific Employers Insurance Co. v. Industrial Accident Commission, 16 Cal.2d 622, 122 P. 570 (1942); 3 SCHNEIDER, *op. cit. supra* note 21 at 544. *See* 5 SCHNEIDER, *op. cit. supra* note 47 at 233.

[53] Lepow v. Lepow Knitting Mills, 263 App. Div. 211, 32 N.Y. Supp. 2d 498 (1942), *rev'd*, 288 N.Y. 377, 43 N.E.2d 450 (1942). *See* 5 SCHNEIDER, *op. cit. supra* note 47 at 233-234.

CONFLICT OF LAWS QUESTIONS IN WORKMEN'S COMPENSATION LAW

*C. J. Otjen**

The purpose of a workmen's compensation act is to regulate the relation of employer and employee within the state.[1] The state also has the right to require compliance with its compensation act as a condition upon which performance of an out-of-state contract of employment shall be permitted in that state.[2] The decisions point out that the state has such an interest in the welfare and protection of its citizens and of those dependent upon them that it may in the exercise of the police power extend the protection of its compensation act to citizens of the state who are injured while performing services outside its boundaries.[3]

When the state exercises the police power, no principle of law and no constitutional right is violated by attaching to contracts of employment made in the state by residents of the state the same rights and duties incident to service outside of the state that are lawfully imposed as incident to the performance of service within the boundaries of the commonwealth.[4] When residents of the state contract for service to be performed outside the state, a constructive status under the act is created, which continues until the employee acquires an actual status as an employee in some other state.[5] The power to impose such rights and duties is dependent upon the existence and continuance of a status, actual or constructive, which makes both the employer and employee subject to the compensation act.

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[1]Wandersee v. Industrial Commission, 198 Wis. 345, 223 N.W. 837 (1929); Ocean Accident & Guarantee Corp. v. Industrial Commission, 32 Ariz. 275, 257 P. 644 (1927).

[2]Interstate Power Co. v. Industrial Commission, 203 Wis. 466, 234 N.W. 889 (1931); Pierce v. Bekins Van & Storage Co., 185 Iowa 1346, 172 N.W. 191 (1919); American Radiator Co. v. Rogge, 86 N.J. Law 436, 92 A. 85 (1914); Chicago, R. I. & P. Ry. v. Lundquist, 206 Iowa 499, 221 N.W. 228 (1928); Johnson v. Nelson, 128 Minn. 158, 150 N.W. 620 (1915).

[3]Val Blatz Brewing Co. v. Industrial Commission, 201 Wis. 474, 230 N.W. 622 (1930); New York Central R.R. v. White, 243 U.S. 188 (1917). For general literature on conflict of laws problems in workmen's compensation law, see RESTATEMENT, CONFLICT OF LAWS § § 398-403; Otjen, *Workmen's Compensation—Conflict of Laws*, 1947 WIS. L. REV. 139 (1947); HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 34-42 (1944); Dunlap, *The Conflict of Laws and Workmen's Compensation*, 23 CALIF. L. REV. 381 (1935); Dwan, *Workmen's Compensation and the Conflict of Laws*, 11 MINN. L. REV. 329 (1927); Dwan, *Workmen's Compensation and the Conflict of Laws*, 20 MINN. L. REV. 19 (1934).

[4]Ocean Accident & Guarantee Corp. v. Industrial Commission, *supra* note 1; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398 (1915).

[5]Val Blatz Brewing Co. v. Industrial Commission, *supra* note 3.

The Mississippi Workmen's Compensation Act of 1948 contains some specific provisions relating to the application of that Statute.[6] Based on these general principles of law and that Act, it is possible that the Mississippi Law will be applied to numerous factual situations involving conflict of laws questions.

(1) Where both employer and employee are residents of Mississippi and the contract of employment is made therein, the provisions of the Mississippi Act become part of the contract and apply to matter where the injury is sustained.[7]

(2) It applies to an employee of an employer subject to the Mississippi Act, injured in Mississippi, without regard to the place where the contract of employment was made.[8]

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[6]Miss. Laws 1948, c. 354, § 49 provides: "(a) If an employee who has been hired or is regularly employed in this state receives personal injury by accident arising out of and in the course of his employment while temporarily employed outside of this state, he or his dependents in case of his death shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving this state, unless prior to the expiration of such six months' period the employer has filed with the Commission of Mississippi notice that he has elected to extend such coverage a greater period of time.

"(b) The provisions of this section shall not apply to an employee whose departure from this state is caused by a permanent assignment or transfer.

"(c) Any employee who has been hired or is regularly employed outside of this state and his employer shall be exempted from the provisions of this act while such employee is temporarily within this state doing work for his employer if such employer has furnished Workmen's Compensation insurance coverage under the Workmen's Compensation or similar laws of a state other than this state, so as to cover such employee's employment while in this state, provided the extra-territorial provisions of this act are recognized in such other state and provided employers and employees who are covered in this state are likewise exempted from the application of the Workmen's Compensation or similar laws of such other state. The benefits under the Workmen's Compensation Act or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state."

[7]Anderson v. Miller Scrap Iron Co., 169 Wis. 106, 170 N.W. 275 (1919); Interstate Power Co. v. Industrial Commission, *supra* note 2; Zurich General A. & L. Ins. Co. v. Industrial Commission, 193 Wis. 32, 213 N.W. 127 (1940); Industrial Commission v. Aetna Ins. Co., 64 Colo. 480, 174 P. 589 (1918); Grinnell v. Wilkinson, 39 R.I. 447, 98 A. 103 (1916); Gooding v. Ott, 77 W.Va. 487, 87 S.E. 862 (1916); Liggett & Meyers Tobacco Co. v. Goslin, 163 Md. 74, 160 A. 804 (1932); Miller Bros. Construction Co. v. Maryland Casualty Co., 113 Conn. 504, 155 A. 709 (1931); Metropolitan Casualty Co. v. Huhn, 165 Ga. 667, 142 S.E. 121 (1928); Dameron v. Yellowstone Trail Garage, 54 Iowa 646, 34 P.2d 417 (1934); Seiser v. Bragmans Bluff Lumber Co., 146 So. 690 (La. App. 1933); Smith v. Van Noy Interstate Co., 150 Tenn. 25, 262 S.W. 1048 (1924); Hilding v. Dep't of Labor & Industry, 162 Wash. 168, 298 P. 321 (1931).

[8]Interstate Power Co. v. Industrial Commission, *supra* note 2; Salvation Army v. Industrial Commission, 219 Wis. 343, 263 N.W. 349 (1935); Carl Hagenbeck & Great Wallace Show Co. v. Ball, 75 Ind. App. 417, 126 N.E. 504 (1920); Ginsburg v. Byers, 117 Minn. 366, 214 N.W. 55 (1927); Davidheiser v. Hay Foundry & Iron Works, 87 N.J. Law 688, 94 A. 309 (1915).

(3) Where an employer under the Mississippi Compensation Act engages a person to perform services in Mississippi, no matter where or when such contract may have been engendered, its Act would apply even though the employee is injured while outside the state rendering services incidental to his employment within this state, and it is not material whether or not he is a resident of Mississippi.[9]

Likewise the Act will be held not to apply:

(1) Where an employer, engaged exclusively in business confined to another state, hires a Mississippi resident to work exclusively in the other state, notwithstanding both the employee and employer were residents of Mississippi and the contract of employment was made in Mississippi.[10]

(2) Where the employee neither lives nor performs services nor is injured in Mississippi, even though the employee resides and the contract is made in Mississippi.[11]

The application of the Mississippi Workmen's Compensation Act no doubt will come into conflict with the application of similar acts in other states. Claims for compensation for the same injury will be made under the laws of other states and also under the Mississippi Act.

Where commissions in two states have taken jurisdiction and each granted compensation for the same injury, some jurisdictions have met the objection of double liability by giving credit against compensation ordered paid, for the amount paid under the award of the Commission of the other state.[12]

Conflict between awards of compensation by the commissions of two states has raised the question whether the full faith and credit clause of the Constitution requires the recognition of the award of compensation by the first state as binding upon the second state. This question has been considered in recent years by the United States Supreme Court, for the first time in 1943 in *Magnolia Petroleum Company v. Hunt.*[13]

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[9]McKesson-Fuller-Morrison Co. v. Industrial Commission, 212 Wis. 507, 250 N.W. 396 (1933); Penwell v. Anderson, 125 Neb. 449, 250 N.W. 665 (1933); Madderns v. Fox Film Corp., 205 App. Div. 791, 200 N.Y. Supp. 344 (1923), *aff'd*, 237 N.Y. 614, 143 N.E. 764 (1924); Texas Employers' Ins. Ass'n v. Volek, 69 S.W.2d 33 (Tex. Com. App. 1934); Foughty v. Ott, 80 W.Va. 88, 92 S.E. 143 (1917).

[10]Schooley v. Industrial Commission, 233 Wis. 631, 290 N.W. 127 (1940); Watts v. Long, 116 Neb. 656, 218 N.W. 410 (1928); Perlis v. Lederer, 189 App. Div. 425, 178 N.Y. Supp. 449 (1919).

[11]Wandersee v. Industrial Commission, *supra* note 1; Interstate Power Co. v. Industrial Commission, *supra* note 2; Dunville v. Industrial Commission, 228 Wis. 86, 279 N.W. 695 (1938); Tripp v. Industrial Commission, 89 Colo. 512, 4 P.2d 917 (1931); Bement Oil Corp. v. Cubbison, 84 Ind. App. 22, 149 N.E. 919 (1925); Freeman v. Higgins, 123 Neb. 73, 242 N.W. 271 (1932).

[12]Salvation Army v. Industrial Commission, *supra* note 8.

[13]320 U.S. 430 (1943). See Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt,* 44 COL. L. REV. 330 (1944).

Hunt, a resident of Louisiana, was employed in Louisiana by the petroleum company of the same state, in connection with drilling oil wells. He was sent from Louisiana to Texas, and while working there sustained an injury. Application for award of compensation was made in Texas, and the insurer began to make payments under the Texas law. Hunt returned to Louisiana and announced his intention of claiming under the Louisiana Act. The Texas Board gave notice and held a hearing "to determine the liability of the insurer under the Texas law". Hunt did not appear. The Texas Board made an award, but before it became final Hunt refused to accept its benefits and brought suit in Louisiana under its Compensation Act. He recovered judgment in which credit was given for payments under the Texas award. The Court states:

> The significant question in this case is whether the full faith and credit clause has deprived Louisiana of the power to deny that the Texas award has the same binding effect on the parties in Louisiana as it has in Texas . . . The Texas award, being a bar to any further recovery of compensation for respondent's injury, is, by virtue of the full faith and credit clause, exclusive of his remedy under the Louisiana Act.

The Court observed that:

> Respondent's injury in Texas did not give rise to two causes of action merely because recovery in each state is under a different statute, or because each affords a different measure of recovery . . . The grounds of recovery are the same in one state as in the other—the injury to the employee in the course of his employment. The whole tendency of our decisions under the full faith and credit clause is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot split up his claim and 'a fortiori, he cannot divide the grounds of recovery'. . . . Respondent was free to pursue his remedy in either state but, having chosen to seek it in Texas, where the award was res judicata, the full faith and credit clause precludes him from again seeking a remedy in Louisiana upon the same grounds.

In *McCartin v. Industrial Commission*,[14] a resident of Illinois, employed by an Illinois corporation, but subject to the Wisconsin Act, was injured while working in Wisconsin. The contract of employment was made in Illinois. An award of compensation was made in Illinois. The Wisconsin Commission took jurisdiction and also awarded compensation,

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[14]McCartin v. Industrial Commission, 248 Wis. 570, 22 N.W.2d 522 (1946). See Comment, 47 Col. L. Rev. 846 (1947).

giving credit for payment under the Illinois award. The Wisconsin Commission followed the rule as heretofore established. The Wisconsin Supreme Court reversed the award of the Industrial Commission, taking the language of the Court in the *Magnolia* case as literally true. On a writ of certiorari, the Supreme Court of the United States reviewed the *McCartin* case and held that *Magnolia Petroleum Company v. Hunt* did not control the former.[15] The Court observed:

> But there is nothing in the statute [Illinois] or in the decisions thereunder to indicate that it was designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment . . . We need not rest our decision, however, solely upon the absence of any provision or construction of the Illinois Workmen's Compensation Act forbidding an employee from seeking alternative or additional relief under the laws of another state. There is even stronger evidence that the employee is free to ask for additional compensation in Wisconsin.

The Illinois award was based upon a settlement contract which provided that "this settlement does not affect any rights that the applicant may have under the Workmen's Compensation Act of Wisconsin".

The provision of the contract was based upon the information to both parties that the Wisconsin Commission would grant compensation, giving credit against its award for the amount paid under the Illinois award. The Court states:

> This contract provision saving the rights of the employee in Wisconsin thus became part of the Illinois award . . . But when the reservation in this award is read against the background of the Illinois Workmen's Compensation Act, it becomes clear that the reservation spells out what we believe to be implicit in that act—namely, that an Illinois workmen's compensation award of the type here involved does not foreclose an additional award under the laws of another state. And in settling this case, that fact is of decisive significance.
>
> Since this Illinois award is final and conclusive only as to the rights arising in Illinois, Wisconsin is free under the full faith and credit clause to grant an award of compensation in accord with its own laws. Magnolia Petroleum Co. vs Hunt, supra, thus does not control this case.

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[15]Industrial Commission v. McCartin, 330 U.S. 622 (1947).

The *Magnolia* decision did not control the *McCartin* case because of the reservation as to the Wisconsin Act and the absence in the Illinois Statute of a provision making its award in lieu of all other recovery. The *McCartin* decision does not overrule the *Magnolia* case, but rather distinguishes the facts in the former from the rule in the latter.

The distinction between these two cases rests upon the provision in the Texas Law making the award of compensation final and in lieu of any other recovery, while no similar provision appeared in the Illinois Act. The Mississippi Act states that the payment of compensation under it shall be exclusive and in place of all other liability.[16]

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[16]Miss. Laws 1948, c. 354, § 49(c) states: "The benefits under the Workmen's Compensation Act or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state."

See also *id.* § 5, providing for "exclusiveness of liability."

ADMINISTRATION OF WORKMEN'S COMPENSATION

*Walter F. Dodd**

The State of Mississippi is the last of the states to adopt workmen's compensation, and its Statute[1] shows that it has profited from the experience of other states. It is well-phrased. Its chief problem is now that of successful administration. An extension to occupational diseases may properly be made after experiment with the present Act. And the administration of compensation for industrial injuries must be joined with other state functions having to do with labor. Avoidance of injuries is more important than compensation for injuries, and much may be accomplished toward their avoidance. Insurance companies may be of distinct aid in establishing standards of safety in the employment of labor. In establishing anew its plan of administration, the State of Mississippi has the opportunity to profit from the experience of other states, and to avoid the errors which they have made. The author of the present article may restate a statement which he made more than twelve years ago:

> Perhaps it is sufficient here to say that little is accomplished by the mere substitution of liability without fault for liability in case of fault. Liability without fault is the essential basis of workmen's compensation, but the proper application of the principle requires an efficient administration by a permanent administrative organization. Personnel is the essential element in such an organization, and little attention has, as yet, been devoted to a permanent and efficient personnel. Workmen's compensation has proved to be better than the plan of employers' liability, but the superiority is not great in states with court administration; and in all jurisdictions there is ample opportunity for material improvement in administration.[2]

This statement is as true now as in 1936. With reference to administration, the two most essential elements are (1) the Workmen's Compensation Commission, and (2) judicial review of compensation awards.

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[1]Miss. Laws 1948, c. 354.

[2]DODD, Preface to ADMINISTRATION OF WORKMEN'S COMPENSATION xviii (1936).

The Commission and Its Staff

The Mississippi Statute has wisely provided a full-time Commission of three members, each serving for a term of six years after the expiration of the first terms, and with recommendation of continued service so long as efficiency is demonstrated.[3] Equally important is the plan of an efficient civil service in the appointment of officers and employees necessary in the administration of the Workmen's Compensation Law.[4]

Political influences should be avoided, both in appointments and in continuance in office. The six-year term will help in part, but consideration must be given to each new appointment. Through political action in controlling the appointment of members of the Industrial Commission in Illinois, the administration of that Compensation Act has been in turn good, indifferent, bad, and again good; and other states have had similar experiences.

Efficient administration requires not only a competent commission but also a competent and adequate staff. But an efficient staff depends upon adequate supervision from above. The situation was well-stated by E. H. Downey:[5]

> The hearing of disputed claims is by no means the chief work of a compensation board. The daily routine of receiving, docketing, scrutinizing, filing and following up reports, disapproving settlements which are prima facie incorrect, investigating injuries for which the documents are inconclusive, looking into complaints and delays, compiling records and making statistical analyses—this routine whereof the public takes little note is the very essence of efficient administration. The cases which come before the board or its referees for adjudication are few and the decisions thereon are important chiefly as they are given practical effect in the supervisory oversight of uncontested settlements. The board lay down the general policy of administration, but it depends upon subordinate examiners, supervisors and clerks whether the usual interval between injury and first payment shall be seventeen days or thirty-five and whether short-changing shall be rare or frequent. A competent ministerial staff is, on this account, scarcely less important than competent commissioners and referees.

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[3]Miss. Laws 1948, c. 354, § 37.
[4]*Id.* § 41.
[5]Downey, Workmen's Compensation 75-76 (1924).

JUDICIAL REVIEW

The function of the Compensation Commission is that of representing both the employer and the injured employee in the determination of proper compensation for the injured employee. Successful administration is measurable in part by the proportion of claims settled without contest, although contest is more likely in major disabilities and death claims. In Illinois during the fiscal year 1929-1930 there occurred approximately 56,100 industrial injuries which were compensable under the law, of which more than 53,000 involved no contest. Similar conditions existed in Massachusetts, Pennsylvania, Wisconsin and Ohio.

Under the Mississippi law, as in other states, (1) informal conferences and hearings in contested cases may be held by a commissioner or a designated representative of the Commission, and may result in decisions;[6] (2) such a decision is final unless within twenty days a review by the full Commission is sought;[7] (3) the final award of the Commission is binding unless an appeal is taken within thirty days to the circuit court of the county in which the injury occurred;[8] and (4) an appeal may be taken to the Supreme Court in the same manner as that provided for other cases.[9]

Review by the Court is essential for the protection of parties, and some problems of a new statute must be considered by the Supreme Court of Mississippi. One of such problems needs prompt determination. The Commisson is "not bound by common law or statutory rules of evidence or by technical or formal rules of procedure."[10] Appeals are considered "only upon the record as made before the Commission," and:

> The Circuit Court shall review all questions of law and of fact. If no prejudical error be found, the matter shall be affirmed and remanded to the Commission for enforcement. If prejudicial error be found, the same shall be reversed and the circuit court shall enter such judgment or award as the Commission should have entered.[11]

It is not within the Statute, but it is for the State Supreme Court to find what weight shall be given by the courts to the findings of fact by the Commission. Upon a specialized issue, with its attention constantly devoted to that issue, and with its hearing not bound by restrictive rules of

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[6]Miss. Laws 1948, c. 354, § 18.
[7]*Ibid.*
[8]*Id.* § 20.
[9]*Ibid.*
[10]*Id.* § 22(a).
[11]*Id.* § 20.

evidence and of procedure, the Commission's findings should be given substantial weight. Under such circumstances it is not for the Court to search for a prejudicial error when the Court could not have a background such as that of the Commission. Under such circumstances the Supreme Court of Illinois takes the position that:

> The rule is well settled that this court does not reverse findings of the Industrial Commission unless manifestly against the weight of the evidence. . . . It is our duty, however, to weigh and consider the evidence in the record, and if the decision of the Commission is without substantial foundation in the evidence, it must be set aside.[12]

In *Thomas v. Pennsylvania Railroad Company*,[13] Chief Justice Bond said that "in nearly half of the state acts in this country and in federal acts finality is given to the finding of the commission on facts."

The Supreme Court of Mississippi has authority to determine what weight should be given to findings of fact by the Workmen's Compensation Commission, and the exercise of that authority will be of distinct value. It is essential that it promptly establish a rule of liberality in the reviewing of all questions of fact.

The circuit courts are to review "all questions of law and of fact," and are to affirm the findings of the Commission "if no prejudicial error be found."[14] The court's duty to review all questions of fact is in order to determine whether there are facts supporting the decision of the Commission. It is a judicial function to determine whether administrative findings are based on evidence; and a "prejudicial error" should be found only where the findings of the Commission are manifestly against the weight of the evidence, or unsupported by substantial evidence. Administrative findings must be based upon evidence, and it is the function of the court to make sure that such evidence exists. However, a court review based upon a complete and detailed re-examination of the evidence places a heavier burden upon the courts, and a lesser degree of responsibility upon the administrative agency.

The purpose of workmen's compensation statutes is to obtain prompt and inexpensive compensation for industrial accidents. Anything that promotes detail or litigation creates both delay and expense. Simplicity of procedure is important, and there is no occasion for technical rules of evidence which were developed at common law for the protection of a jury.

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[12]Glora v. Industrial Commission, 388 Ill. 114, 57 N.E.2d 373 (1944).
[13]162 Md. 509, 160 A. 793 (1932).
[14]Miss. Laws 1948, c. 354, § 20.

A judicial review of facts in detail is almost certain to be conducted in accordance with the technical rules of evidence and of procedure usually applied by the courts. Even though the courts may seek to avoid this, it will be difficult for them to apply to compensation cases a standard different from that in other cases. Moreover, technical detail in court review is likely to produce technicality upon the part of the administrative body, even though, as in the Mississippi statute, it is not bound by common law or statutory rules of evidence or by technical rules of procedure.

Under any properly administered statute, proportionately few compensation cases go to the court for review; and the standards of justice in determination of compensation claims are, of necessity, set by the administrative authorities. Emphasis should be placed upon the efficiency of administration rather than upon an extension of judicial review; and the judicial function should be so exercised as to require the compensation commission to act upon substantial evidence. Essential in the administration of the compensation law are an efficient commission, and a prompt establishment of standards of cooperation by the courts of Mississippi.

The language of Section 20 of the Mississippi Act is capable of being construed as requiring a judicial review of all facts and a finding of prejudicial error if all facts are not given consideration or sufficient weight by the Commission. But the terms of the Statute are such that the Supreme Court of Mississippi may restrict itself to "prejudicial error" resulting from findings manifestly against the weight of the evidence, or "unsupported by substantial evidence"—the principle of substantial evidence being that of section 10(e) of the Administrative Procedure Act enacted by Congress in 1946.[15]

With an efficient administration, courts should give substantial weight to the determinations of the Workmen's Compensation Commission. Its findings of fact should be sustained unless substantial error is obvious. Should there be a continuance of substantial errors, a change should promptly be made in the personnel of the Commission and of its staff. If the courts develop a policy of reviewing every detail of administrative action, there is little likelihood of an efficient administration. In order to obtain the latter, the Commission must have a direct responsibility to produce it.

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[15]That this may be the trend in Mississippi is indicated by California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542 (1946), *sugg of error overruled,* 200 Miss. 824, 28 So.2d 120 (1946); and by Dixie Greyhound Lines, Inc. v. Mississippi Public Service Commission, 190 Miss. 704, 200 So. 579 (1941), *sugg. of error overruled,* 190 Miss. 704, 1 So.2d 489 (1941).

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EMPLOYERS COVERED UNDER THE MISSISSIPPI WORKMEN'S COMPENSATION ACT

The question which has usually prefaced all other queries by employers with reference to the intricacies of Mississippi's recently enacted Workmen's Compensation Act has been: To whom does the Act apply? And in many instances it has not been possible to answer that question with complete assurance, despite the fact that a casual appraisal of the Law would indicate that it sets forth in the section on "Definitions"[1] and in the section on "Application"[2] an adequate statement of the coverage of the Act as applied to employers. There are a number of points, however, which could not be completely covered without undue verbosity in the Act and which, as a result, will probably be subject to final determination by the Commission or by the courts. It is the purpose of this discussion to present some of those problems which may arise with reference to the matter of employers covered under the Law and to indicate what the experience in other jurisdictions has been in resolving those dilemnas.

Chapter 354 of the Mississippi Laws of 1948, which is the Mississippi Workmen's Compensation Act, initially defines "employer" as including "except where otherwise expressly stated, . . . a person, partnership, association, corporation, and the legal representative of a deceased employer, or the receiver or trustee of a person, partnership, association, or corporation."[3] This does not present the entire picture, though, for Section 3, in setting forth the application of the Act, considerably lessens the scope of coverage. That section is in part as follows:

> Section 3. Application. The following shall constitute employers subject to the provisions of this act:
>
> 1. Every person, firm and private corporation, including any public service corporation, but excluding, however, all nonprofit charitable, fraternal, cultural or religious corporations or associations, that has in service eight or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied. Any member of a partnership, firm or association, or officer of a corporation who regularly performs manual labor in or about an establishment, shall

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[1]Miss. Laws 1948, c. 354, § 2(5).

[2]*Id.* § 3.

[3]*Id.* § 2(5). The New York Act has this identical definition with the following additions: ". . . employing workmen in hazardous employments, including the state and a municipal corporation or other political subdivision thereof." N.Y. Laws 1913, c. 816, § 2(3), as amended by N.Y. Laws 1914, c. 316. Oklahoma also has the same basic definition with additions. COMP. OKLA. STAT. § 3-13350(3) (1921).

be considered a workman or operative in determining whether or not such a person, firm or private corporation, or public service corporation, has in its service eight or more workmen.

Domestic servants, farmers and farm labor are not included under the provisions of this act, but this exemption does not apply to the processing of agricultural products when carried on commercially.

The term "person, partnership, association, [or] corporation" is fairly typical of a number of American workmen's compensation laws. Some of the states, however, provide merely that an employer be a person who hires another for wages, while a few remove virtually all limitations and, for workmen's compensation purposes, make an employer out of the state or anyone else who has a natural person in his employ.[4] But even those common words of Section 3, exclusive of the numerous and varying conditions and limitations which necessarily surround them in workmen's compensation laws, are susceptible of ambiguity and uncertainty in many cases.

For instance, the much-used word "partnership" has been the subject of a number of cases in workmen's compensation litigation, where the law of partnership has failed to supply an answer.[5] The tendency in most jurisdictions has been to follow the old English rule[6] and to hold that partners can be employers only.[7] In a few states, however, the legislatures and the courts have combined to liberalize the rule to enable working partners to be eligible for compensation.[8] As seen above, Mississippi has incorporated into its Act the latter view with reference to working partners. If the partnership is a sham to avoid the payment of compensation insurance, the courts will look behind the legal framework to ascertain the real relation-

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[4] 1 SCHNEIDER, WORKMEN'S COMPENSATION 577-578 (3d ed. 1941).

[5] 1 SCHNEIDER, WORKMEN'S COMPENSATION 217 (2d ed. 1932). For some of these problems see Georgia Casualty Co. v. Hoage, 59 F.2d 870 (App. D.C. 1932).

[6] Ellis v. Joseph Ellis & Co., [1905] 1 K.B. 324.

[7] HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 228 (1944). *See* Chambers v. Macon Wholesale Grocer Co., 334 Mo. 1215, 70 S.W.2d 884 (1934); Smith v. Price Bros. Co., 131 F.2d 750 (C.C.A. 6th 1942), *cert denied*, 318 U.S. 762 (1943); Rasmussen v. Trico Feed Mills, 148 Neb. 855, 29 N.W.2d 641 (1947); Dube v. Robinson, 92 N.H. 312, 30 A.2d 482 (1943); Dezendorf v. National Casualty Co., 171 So. 160 (La. App. 1936); Chandler v. Harris, 47 Ga. App. 535, 171 S.E. 174 (1933).

[8] Johnson v. Industrial Accident Commission, 198 Cal. 234, 244 P. 321 (1926); Ohio Drilling Co. v. State Industrial Commission, 86 Okla. 139, 207 P. 314 (1922). It is interesting to note that at one time it was considered impossible for a working partner to be an employee of the partnership. 1 CAMPBELL, WORKMEN'S COMPENSATION 390 (1935). A section in the California Act classifying a working partner as an employee was twice held unconstitutional. Flickenger v. Industrial Accident Commission, 181 Cal. 425, 184 P. 851 (1919); Employers' Liability Co. v. Industrial Accident Commission, 187 Cal.615, 203 P. 95 (1921).

ship of the parties.[9] Thus, where, as a condition of employment, miners were required to sign as "partners" in a mining enterprise and where, as "partners" they waived their workmen's compensation benefits, the Oklahoma Court ruled that a member who was injured was in reality an employee and was entitled to compensation.[10] However, if there is in fact and in law a partnership, even though it may be shown to have been established solely for the purpose of dodging the effect of the compensation act, it must be held valid.[11] Some states make as the test whether the supposed partner owns an actual interest in the business and shares both profits and losses.[12]

The word "association" is another term found in the definition of employers covered under the Act, and experience has shown it to be of rather nebulous meaning. The Mississippi Court has determined it to mean "a number of persons banded together for a common business purpose" and to be synonymous with "company,"[13] and in the *Coronado Coal Company* case[14] it was decided by the United States Supreme Court that labor unions come within the definition. Thus, it has been held that a business manager of a labor union, although also a member of the union, was an employee of an association and was, therefore, under the act.[15] It seems probable that the same result would have been reached under the Mississippi Law.

In the Act we have seen that the term "corporation" has been qualified by prefacing it with the word "private." Unlike many of the other acts in this country and contrary to the present-day trend toward greater inclusiveness,[16] the Mississippi Statute, as will be pointed out in more detail later, seems to be the only act in the United States which is completely silent on the matter of its applicability to public corporations and to the state itself and its political subdivisions. Specifically included among the corporations covered by the Act are public service corporations,

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[9]Davidson v. Cardillo, 143 F.2d 154 (App. D.C. 1944); Montello Granite Co. v. Industrial Commission, 227 Wis. 170, 278 N.W. 391 (1938); People v. Levine, 160 Misc. Rep. 181, 288 N.Y. Supp. 476 (1936).

[10]Utility Coal Co. v. Rogez, 170 Okla. 264, 39 P.2d 60 (1935). *See* HOROVITZ, *op. cit. supra* note 7 at 230, and 5 SCHNEIDER, SUPPLEMENT TO LAW OF WORKMEN'S COMPENSATION 728 (1935).

[11]People v. Levine, *supra* note 9.

[12]Butz v. Hahn Paint & Varnish Co., 220 Iowa 995, 263 N.W. 257 (1936); Lipscomb v. State, 148 Miss. 410, 114 So. 754 (1927).

[13]Lee Mutual Fire Ins. Co. v. State, 60 Miss. 395 (1882).

[14]United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922). This case was followed by the Mississippi Court in Varnado v. Whitney, 166 Miss. 633, 147 So. 479 (1933).

[15]Standard Accident Ins. Co. v. Hoage, 66 F.2d 275 (App. D.C. 1933).

[16]HOROVITZ, *op. cit. supra* note 7 at 184. See Caughman v. Columbia Y.M.C.A., 47 S.E.2d 788 (S.C. 1948).

and specifically exempted are "all nonprofit, charitable, fraternal, cultural or religious corporations or associations."[17]

Thus, with this general view of the broad field of "employers" as set forth in our Statute, we turn to a consideration of the narrowing qualifications of the Act itself and the efforts of other jurisdictions to explain and clarify some of the questions which will undoubtedly arise under the Mississippi Law.

Exceptions under the Act

As mentioned above and as is the case in all compensation acts, the Mississippi Law excludes certain types of employers and exempts others under certain conditions. With one or two exceptions the Act of this state contains the general pattern of exclusionary provisions enunciated in other state acts. The bulk of the decisions which are concerned with the employer problem arise under these sections which provide for exceptions to the coverage of the acts.

Farm and Agricultural Employments

As far as Mississippi is concerned, the one great class singled out for exemption from the compulsory application of our Act is, of course, the farmers of the state. Virtually every workmen's compensation statute in the nation makes a similar exception.[18] The basis for such exclusion does not rest on the nonhazardous nature of farm employment, for, indeed, agricultural work has been determined to be second only to that of the railroads in the degree of danger involved,[19] and statistics show that there are actually more fatalities in farm work than in any other employment.[20] The exemption seems to stem from the fact that farm employers are less able to include the added cost of compensation insurance in the price of their products, since ordinarily the value of agricultural produce is fixed not by the farmer who sells it but by those in control of the markets in other places.[21]

Although generally "farm" and "agricultural" employments are used synonymously and interchangeably, the latter has been declared as more inclusive than the former in workmen's compensation parlance.[22] It will

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[17]Miss. Laws 1948, c. 354, § 3.

[18]2 Schneider, *op. cit. supra* note 4 at 609. On page 615 of the same work Schneider criticizes the exclusion as being "perhaps based more on legislative expedience than upon sound reason." See also Corten, *Report of the Special Committee on Farm Coverage*, 1 NACCA L.J. 121 (1948).

[19]2 Schneider, *op. cit. supra* note 4 at 615.

[20]Corten, *supra* note 18 at 124.

[21]2 Schneider, *op. cit. supra* note 4 at 615. For a harsher answer see Corten, *supra* note 18 at 122.

[22] Gwin v. J. W. Vestal & Son, 205 Ark. 742, 170 S.W.2d 598 (1943); St. Louis Rose Co. v. Unemployment Compensation Commission, 348 Mo. 1153, 159 S.W.2d 249 (1941); Town of Lincoln v. Murphy, 314 Mass. 16, 49 N.E.2d 453 (1943).

be noted that the Mississippi Act restricts its exemption to "farmers and farm labor," thus making it more liberal than most acts in that regard.[23] The scope of such activities is, of course, broad and not easily defined. The ultimate test is not the ordinary business of the employer nor the particular work being done by the employee at the time of his injury nor the place where the work is performed, but rather the nature of the work of the employee considered in the light of all the conditions of his employment.[24] As a practical matter, virtually all work which can be considered incidental to carrying on farming or agricultural operations and which is done by servants employed primarily for the business of farming is classified as farm or agricultural employment, and consequently does not come under workmen's compensation coverage.[25] The following language from the decision in the case of *Coleman v. Bartholomew*[26] illustrates this point of view:

> Is the hired man, who pounds his finger while shingling the pigpen, any the less a 'farm laborer' than when he pounds his finger while building a fence? It is the duty of a farm laborer to build a load of hay; it is likewise his duty to help shingle the barn to protect the hay from the elements. Both processes are necessary in order to preserve the hay. Both are essentially within the scope of the duties of the farm laborer, and it makes no difference in principle whether he breaks his leg falling from the roof of the barn or the load of hay.

A problem which has frequently confronted the commissions and courts has arisen in cases where a farmer carries on timber-cutting operations on his place and employs the same laborers in both occupations. If the two businesses are linked sufficiently together so that the forestry business may be reasonably said to be an incident or a part of farming, then the courts usually hold the employer not liable under workmen's compensation.[27] Virtually the same test has been applied to the trucking and hauling business, dairying, horticultural pursuits, and the operation of ma-

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[23]Miss. Laws 1948, c. 354, § 3. See Ethridge, *The New Mississippi Workmen's Compensation Act,* 2 NACCA L.J. 88 (1948).

[24]Tucker v. Newman, 217 Minn. 473, 14 N.W.2d 767 (1944); Peterson v. Farmers' State Bank, 180 Minn. 40, 230 N.W. 124 (1930); Oliver v. Ernst, 148 Neb. 465, 27 N.W.2d 622 (1947); Evansville Veneer & Lumber Co., 116 Ind. App. 616, 65 N.E.2d 742 (1946).

[25]Industrial Accident Commission v. Eggiman, 172 Ore. 19, 139 P.2d 565 (1943); Coleman v. Bartholomew, 175 App. Div. 122, 161 N.Y. Supp. 560 (2d Dep't 1916).

[26]*Supra* note 25.

[27]Robinson v. Stockley, 166 Tenn. 380, 61 S.W.2d 677 (1933); Hagelstad v. Usiak, 190 Minn. 513, 252 N.W. 430 (1934); Bradley v. Blakely, 154 So. 415 (La. App. 1934).

chinery, where such activities were carried on in connection with a farm.[28] Activities which are closely allied to actual farming operations and which almost always are considered a part of agricultural employment are the repair (on the farm) of farm machinery,[29] the digging of drainage ditches,[30] and the clearing of land for cultivation.[31] But one who was employed to run a threshing machine and go from one farm to another was not excluded.[32] Similarly the act has been held to apply to the operator of a fox and mink farm[33] and of a turpentine farm;[34] to the operator of a bulldozer in soil conservation work;[35] to a ginseng raiser;[36] and to one who poisoned prairie dogs.[37]

A difficulty which must be anticipated with regard to the administration of the Mississippi Act has to do with the application of the provision that the exemption of farm employers "does not apply to the processing of agricultural products when carried on commercially."[38] Such a clause was designed, of course, to bring the operators of cotton gins,[39] cottonseed oil mills, vegetable canneries, and probably dairies under the Act, but, in view of the litigation which has arisen in other jurisdictions, we shall undoubtedly see problems arise in determining exactly where the boundary lies between production and processing in a number of instances.

Where a large corporation is engaged in the operation of a farm, either as its main business or incidental to its main business, the decisions seem in

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[28]*In re* Keaney, 217 Mass. 5, 104 N.E. 438 (1914); Beyer v. Decker, 159 Md. 289, 150 A. 804 (1930); Bucher v. American Fruit Growers' Co., 107 Pa. Super. 399, 163 A. 33 (1932); Taverner v. Anderson, 220 Iowa 151, 261 N.W. 610 (1935); Koger v. A. T. Woods, Inc., 38 N. M. 241, 31 P.2d 255 (1934). It should be noted here that the variations among the various acts as to what constitutes agricultural and/or farm employment are reflected in the conflicting decisions on this question.

[29]Miller & Lux, Inc. v. Industrial Accident Commission, 179 Cal. 764, 178 P. 960 (1919).

[30]Culpepper v. White, 52 Ga. App. 740, 184 S.E. 349 (1936).

[31]Stahl v. Patrick, 206 Minn. 413, 28 N.W. 854 (1939); Johnson v. Department of Labor & Industries, 182 Wash. 351, 47 P.2d 6 (1935); Robinson v. Stockley, *supra* note 27.

[32]Hoshiko v. Industrial Commission, 83 Colo. 556, 266 P. 1114 (1928); Boyer v. Boyer, 178 Minn. 512, 227 N.W. 661 (1929).

[33]Cedarburg Fox Farms v. Industrial Commission, 241 Wis. 604, 6 N.W.2d 687 (1942); Tucker v. Newman, *supra* note 24. The court in the latter case had this to say: "We do not believe that it can, with reason, be said that those terms [agricultural and farm labor] ordinarily comprehend the occupation of raising foxes and mink, not to mention such rare and exotic ones as a 'worm, rattlesnake, crocodile, or even oyster farm'."

[34]Pridgen v. Murphy, 44 Ga. App. 147, 160 S.E. 701 (1931).

[35]Oliver v. Ernst, *supra* note 24.

[36]Eberlein v. Industrial Commission, 237 Wis. 555, 297 N.W. 429 (1941).

[37]C. G. Slaughter Cattle Co. v. Pastrana, 217 S.W. 749 (Tex. Civ. App. 1920).

[38]Miss. Laws 1948, c. 354, § 3.

[39]In the original draft of House Bill 351, as reported by the Labor Committee of the House of Representatives, cotton gins were specifically exempted from the application of the Act, but an amendment on the floor of the House removed such exemption.

general agreement that the corporation is not liable for workmen's compensation to those employees normally exempted from coverage as farm or agricultural laborers.[40] The nature of the work of the individual employee is the controlling factor rather than the general business of the employer.[41]

There can be no argument that the section exempting farmers from coverage is discriminatory, for no less an authority than the United States Supreme Court has decided in the case of *New York Central Railroad Company v. White*[42] that such a provision does not violate the "equal protection" clause of the Constitution.

Among the various compensation acts only the laws of Hawaii,[43] Connecticut,[44] Ohio,[45] Vermont,[46] and Louisiana[47] do not extend a specific exemption to farm and/or agricultural employments. As for Louisiana, the courts of that state decided for a number of years that farm work was not a hazardous employment so as to bring it under the act.[48] Recent decisions indicate that the tribunals of that state are now being realistic about the hazardous nature particularly of mechanized farming, and in the case of *Collins v. Spielman*[49] the Louisiana Supreme Court held that an agricultural worker could recover where his normal employment was the operation of farm trucks and tractors.

Closely connected in workmen's compensation laws with the exception of agricultural and farm employments is domestic service, and in virtually every case domestic servants are excluded. The test to be applied in determining the application of the law is the "character of work performed . . . in or about the home of the employer," and not the place where the servants reside or take their meals.[50] Connecticut is the only state in the Union where domestic employers are not excepted.[51]

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[40]Shafer v. Parke, Davis & Co., 192 Mich. 577, 159 N.W. 304 (1916); C. G. Slaughter Cattle Co. v. Pastrana, *supra* note 37; Miller & Lux, Inc. v. Industrial Accident Commission, *supra* note 29.

[41]Ocean Accident & Guarantee Co. v. Industrial Accident Commission, 69 Utah 473, 256 P. 405 (1927).

[42]243 U.S. 188 (1917).

[43]HAWAII REV. LAWS, § § 7480 & 7540 (1933).

[44]CONN. GEN. STAT., § 5223 (1930).

[45]OHIO GEN. CODE, § 1465-60.

[46]VT. GEN. LAWS, § 6502 (1933).

[47]La. Act 20 of 1914, § 1.

[48]Lewis v. A. Moresi Co., 196 So. 70 (La. App. 1940). In Williams v. Westdale Corp., 3 So.2d 684 (La. App. 1941), the court held that use of tractor did not make farming hazardous, since tractor was not "indispensable" but only "more convenient and/or economical." See Malone, *Hazardous Businesses and Employments under the Louisiana Workmen's Compensation Law*, 22 TULANE L. REV. 420 (1948).

[49]200 La. 586, 8 So.2d 608 (1942).

[50]2 SCHNEIDER, *op. cit. supra* note 4 at 610. *See* also Anderson v. Ueland, 197 Minn. 518, 267 N.W. 517 (1936); Barres v. Watterson Hotel Co., 196 Ky. 100, 244 S.W. 308 (1922); Blast v. Sisters of Mercy, 256 Mich. 1, 239 N.W. 410 (1931).

[51]2 SCHNEIDER, *op. cit. supra* note 4 at 610.

State and Political Subdivisions

As pointed out earlier, the Mississippi Act appears to be the only one in the United States which is completely silent as to the place of the state and its political subdivisions in the workmen's compensation scheme of things. In the face of such reticence, the right of recovery of some state and local governmental employees hinges on the interpretation which the Attorney General, the Commission, and the courts give to the Act. It seems probable that the following opinion of the Attorney General,[52] given on December 30, 1948, will be supported by the courts: "I am also of the opinion that the Workmen's Compensation Law of Mississippi . . . does not apply to the state, its political subdivisions, departments or state agencies. . ."

Under the theory, however, that what is good for the private goose is good for the public gander, most states have permitted themselves as employers to take advantage of workmen's compensation coverage. The law is compulsory on the state and its political subdivisions in seven states;[53] elective in six;[54] and may be rejected under certain conditions in thirty-two.[55] A distinction seems to be made in some of the states as between governmental and proprietary functions, with the latter coming under workmen's compensation. Although Mississippi is the only state which apparently makes an exclusion of governmental employers by the insertion of the word "private" before the word "corporation" in Section 3 of the Act, both the Arkansas and Texas Acts have required interpretation by the attorney general or by the courts to determine that those states and their political subdivisions are not covered.[56]

A review of the cases in the various states reveals a wide dissimilarity in the application of workmen's compensation coverage to the governments. One problem which is encountered in some states and not in others is a constitutional provision immunizing the state from suit. In Illinois, for example, because of such a constitutional limitation, the courts have held that no claim can be brought against the state under the Workmen's Compensation Act, since all tort claims against the state were prohibited in the courts.[57] The application of the Act in that state has consequently been

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[52]Opinion of Miss. Attorney General, December 30, 1948.

[53]Calif., Ga., Iowa, La., N.C., Ore., and Va.

[54]Ala., Kan., Mass., Mo., R.I., and Tenn.

[55]Ariz., Colo., Conn., Del., Idaho, Ill., Ind., Ky., Me., Md., Mich., Minn., Mont., Nebr., Nev., N.H., N.J., N.M., N.Y., N.D., Ohio, Okla., Pa., S.C., S.D., Utah, Vt., Wash., W.Va., Wis., and Wyo.

[56]Brooks v. State, 68 S.W.2d 534 (Tex. Civ. App. 1934); City of Tyler v. Texas Employers' Ins. Ass'n, 288 S.W. 409 (Tex. App. 1926); McCaleb v. Continental Casualty Co., 132 Tex. 65, 116 S.W.2d 679 (1938).

[57]Menestrina v. St. Louis National Stock Yards, 278 Ill. App. 342 (1935).

held to be directory only and not mandatory as applied to the state government.[58]

A number of states[59] agree that the employment must be of an extra-hazardous nature before the governmental agency can be considered an employer under the act. It does not matter whether the activity is governmental or proprietary, for in those jurisdictions it is the hazardous condition of the work which determines the coverage.[60] The Louisiana Court has decided that the provisions of that state's Act that the employment must be extra-hazardous applies only to private employers, and as a result workmen's compensation coverage there has been considerably broader in its applicability to the state and its agencies than to private businesses.[61]

Whether a state is an employer in certain specific activities, of course, varies among the different jurisdictions. A number of states are considered, either by virtue of statute or court decision, to be employers of the officers and men of the National Guard.[62] Generally the state is not deemed to be liable under workmen's compensation to convicts,[63] although Maryland considers the state an employer if the prisoners are engaged in extra-hazardous work.[64] In most states road and highway workers are covered under the act,[65] but in those jurisdictions recognizing only hazardous employments as coming under compensation benefits, highway commission "white collar" workers are excluded.[66]

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[58]Dinwiddie v. Siefkin, 199 Ill. App. 316, 20 N.E.2d 130 (1939).

[59]Ill., Md., N.M., N.Y., Okla., and Wash. *See* 2 SCHNEIDER, *op. cit. supra* note 4 at 280.

[60]2 SCHNEIDER, *op. cit. supra* note 4 at 280.

[61]Charity Hospital v. Board of School Directors, 146 So. 487 (La. App. 1933); Kroncke v. Caddo Parish School Board, 183 So. 88 (La. App. 1938); Washington v. Sewerage & Water Board of New Orleans, 180 So. 199 (La. App. 1938).

[62]According to 2 SCHNEIDER, *op. cit. supra* note 4 at 288, the following state acts apply to the National Guard: Ala., Idaho, Md., Va., Ariz., Neb., N.C., Va., Wash., and Wis. The Delaware Act excludes the National Guard unless the Adjutant General elects to have the Act apply. *See* Globe Indemnity Co. v. Forrest, 165 Va. 267, 182 S.E. 215 (1935); Baker v. State, 200 N.C. 232, 156 S.E. 917 (1931); State v. Johnson, 186 Wis. 1, 202 N.W. 191 (1925). In a recent decision the Nebraska Court has overruled its prior holdings and has made it clear that members of the Nebraska National Guard are not eligible for workmen's compensation. Lind v. Nebraska National Guard, 144 Neb. 122, 12 N.W.2d 652 (1944).

[63]Goff v. Union County, 26 N.J. Misc. 135, 57 A.2d 480 (1948); Greene's Case, 280 Mass. 506, 182 N.E. 857 (1932); Murray County v. Hood, 163 Okla. 167, 21 P.2d 754 (1933); Lawson v. Travelers' Ins. Co., 37 Ga. App. 85, 139 S.E. 96 (1927).

[64]MD. CODE ANN., Art. 101, § 35(a) (1924).

[65]*See* Welch v. Workmen's Compensation Bureau, 31 N.W.2d 498 (N.D. 1948); Aslakson v. State, 217 Minn. 524, 15 N.W.2d 22 (1944); Industrial Commission v. Arizona State Highway Commission, 61 Ariz. 59, 145 P.2d 846 (1943).

[66]*See* Aleksich v. Industrial Accident Fund, 116 Mont. 127, 151 P.2d 1016 (1944); State Highway Dep't v. Allentharp, 182 P.2d 754 (Okla. 1947); 2 SCHNEIDER, *op. cit. supra* note 4 at 290.

The earliest opinion on the applicability of the Mississippi Act was handed down by the Attorney General in answer to a query as to the status of municipalities under the Law. It was then said that the Act did not apply to the cities and towns of the state, and that since they possessed no more power than was specifically granted to them by the state, they could not even elect to come under the provisions of the Act.[67] A subsequent opinion stated further that all municipally owned and operated instrumentalities such as a community hospital were bound by the same rule.[68] In view of the decisions and the wording of Chapter 354, the opinions of the Attorney General are apparently correct. It seems likely that the Act will be broadened in the future, so as to bring at least municipal corporations under the terms of the Law.

The experience of other states reveals a contrariety of views on the status of municipalities under workmen's compensation legislation. The statutes in at least sixteen states[69] expressly bring them within the field of coverage, while the courts have interpreted them to be under the act in a number of other jurisdictions.[70] As in the case of the state government as an employer, a number of states base the liability of municipal corporations on whether the activity engaged in is hazardous or nonhazardous, proprietary or governmental.[71] Some of the acts differentiate in the application of workmen's compensation as to "municipalities" and as to "cities." In several states the law is limited to the latter.[72] In six other states cities may elect to come under the act.[73]

Approximately the same number of states which bring cities and municipalities under workmen's compensation apply the act to their counties. The laws of nineteen states[74] expressly include counties, while the acts are elective in five others.[75] Some of the remaining jurisdictions have a general

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[67]Opinion of Miss. Attorney General, November 17, 1948.

[68]Opinion of Miss. Attorney General, December 21, 1948.

[69]Ariz., Ga., Ill., Iowa, Ky., Md., N.Y., N. J., Okla., Ore., Pa., S.D., Va., Wash., Wis., and Wyo. *See* 2 SCHNEIDER, *op. cit. supra* note 4 at 296.

[70]*See* Sacramento v. Industrial Accident Commission, 74 Cal. App. 386, 240 P. 792 (1925); Esque v. City of Huntington, 104 W. Va. 110, 139 S.E. 469 (1927); State *ex rel.* Post v. Industrial Commission, 127 Ohio St. 187, 187 N.E. 719 (1933).

[71]*See* 2 SCHNEIDER, *op. cit. supra* note 4 at 294-296, and cases cited therein.

[72]Among the states which bring "cities" under workmen's compensation coverage but not "municipalities" generally are: Calif., Colo., La., Me., Mich., Mont., N.M., Nev., Ohio, and Utah. *See* 2 SCHNEIDER, *op. cit. supra* note 4 at 300.

[73]Ala., Kan., Mass., Mo., R.I., and Tenn. *See* 2 SCHNEIDER, *op. cit. supra* note 4 at 300.

[74]Ariz., Calif., Colo., Ill., Iowa, Me., Md., Mich., Mont., N.M., Nev., N.J., Ohio, Okla., Ore., Utah, Wash., Wis., and Wyo. *See* 2 SCHNEIDER, *op. cit. supra* note 4 at 315.

[75]Ala., Kan., Mass., Mo., and Tenn. *See* 2 SCHNEIDER, *op. cit. supra* note 4 at 315.

provision which has been interpreted by the courts to include counties.[76] As in the case of cities a number of conflicting problems have arisen to complicate the matter of applicability. For instance, the Oklahoma Act is applicable to counties, but if a county fails to insure under workmen's compensation, it is still free from common law suit because of the statutory immunity which it enjoys.[77] An earlier Georgia Constitution enumerated the purposes for which counties could levy taxes, and since there was no mention of workmen's compensation in that document, the Georgia Court held unconstitutional the section of the Georgia Act enforcing workmen's compensation on counties.[78] Kansas and Oklahoma counties cannot elect to come under the act unless they are engaged in proprietary functions.[79] The Delaware Act is limited to apply to only one county.[80] In an interesting decision the Colorado Court held that a county in that state is not liable to a juror for workmen's compensation.[81]

Other governmental units which have been brought under workmen's compensation coverage in various jurisdictions are school, irrigation and drainage districts, and public agencies and boards.[82] The Louisiana Court held, however, that although the Act applied to every person in the service of the state or incorporated board or commission, the Louisiana State Normal College did not come under the law.[83] Similarly the Mississippi Attorney General has declared that our Act is not applicable to the University of Mississippi nor to any of its departments and activities.[84] That opinion relied in large measure on the case of *State v. Vicksburg & Nashville Railroad,*[85] where the Mississippi Supreme Court held that such a tax-supported institution is not a private corporation. Consequently as an instrumentality of the state it cannot be said to be included among the employers covered, since it has not been specifically mentioned in the Act.[86]

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[76]2 SCHNEIDER, *op. cit. supra* note 4 at 315.

[77]Board of Commissioners v. Hancock, 96 Okla. 238, 221 P. 429 (1923); Whiteneck v. Board of Commissioners, 89 Okla. 52, 213 P. 865 (1923).

[78]Floyd County v. Scoggins, 164 Ga. 485, 139 S.E. 11 (1927); Murphy v. Constitution Indemnity Co., 172 Ga. 378, 157 S.E. 471 (1931).

[79]Kopplin v. Sedgwick County, 139 Kan. 837, 32 P.2d 1058 (1934); Board of County Commissioners v. Sims, 166 Okla. 298, 27 P.2d 633 (1934).

[80]REV. CODE OF DEL., c. 175. § 42 (1935).

[81]Board of Commissioners v. Evans, 99 Colo. 76, 60 P.2d 225 (1936).

[82]*See* 2 SCHNEIDER, *op. cit. supra* note 4 at 325.

[83]Harris v. Louisiana State Normal College, 18 La. App. 270, 138 So. 182 (1931).

[84]Opinion of Miss. Attorney General, December 30, 1948.

[85]51 Miss. 361 (1875).

[86]Opinion of Miss. Attorney General, December 30, 1948, citing Josselyn v. Stone, 28 Miss. 753 (1855), and City of Jackson v. Wallace, 189 Miss. 252, 196 So. 223 (1940).

Charitable and Religious Organizations

Despite the fact that in a few jurisdictions no exception is made for charitable and religious institutions as employers, the law in most states is in accord with the idea expressed in the Mississippi Act of exempting "all nonprofit charitable, fraternal, cultural or religious corporations or associations."[87] The word "nonprofit" is apparently the key to interpreting this phase of the Act. D. A. Campbell calls such a standard a "jurisdictional shibboleth," and would impose instead the "regularity" test, which is used in a number of states.[88] As a result, churches and charitable organizations of all kinds are under the law in those jurisdictions so long as their activities are carried on with some degree of regularity.[89] An interesting case in this connection is that of *Hall v. Salvation Army*,[90] wherein it was held that the Salvation Army was an employer by virtue of the fact that it gave board, lodging and small sums of money to the inmates of its industrial home.

Considerable difficulty has been experienced in some states, particularly California, in determining where to draw the line with respect to such so-called employees. In fact, the California legislature was forced to amend its Act so as to exclude persons "who perform services in return for aid or sustenance only, received from any religious, charitable or relief organization."[91] By having included the nonprofit element in its Act, Mississippi should have relieved itself of this confusion. Still, as S. B. Horovitz points out, if a nonprofit organization engages in a commercial endeavor, that organization properly comes under the act during the period of such profitable activity.[92]

Number of Employees

Another exception which is found in all of the acts is that with reference to the number of employees engaged in a business. The acts begin their applicability with a minimum of two employees in Oklahoma and

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[87]Miss. Laws 1948, c. 354, § 3. *See* Zoulalin v. New England Sanatorium & Benevolent Ass'n, 230 Mass. 102, 118 N.E. 686 (1918); Caughman v. Columbia Y.M.C.A., *supra* note 16; Hartford Accident & Indemnity Co. v. Dep't of Industrial Relations, 139 Cal. App. 632, 34 P.2d 826 (1934); HOROVITZ, *op. cit. supra* note 7 at 188.

[88]1 CAMPBELL, *op. cit. supra* note 8 at 433.

[89]Roman Catholic Archbishop v. Industrial Accident Commission, 194 Cal. 660, 230 P. 1 (1924); Gardner v. Trustees of Main Street Church, 217 Iowa 1390, 250 N.W. 740 (1933); Hope v. Barnes Hospital, 227 Mo. App. 1055, 55 S.W.2d 319 (1932); Brooklyn Children's Aid Society v. Industrial Board, 240 N.Y.Supp. 70, 136 Misc. Rep. 379 (1930).

[90]236 App. Div. 199, 258 N.Y. Supp. 269 (1932).

[91]1 CAMPBELL, *op. cit. supra* note 8 at 434.

[92]HOROVITZ, *op. cit. supra* note 7 at 188. *See* Moran v. Plymouth Rubber Co. Mutual Benefit Ass'n, 207 Mass. 444, 30 N.E.2d 238 (1940).

range upward to a minimum of sixteen in Alabama.[93] The Mississippi Act says on middle ground with a low of eight "workmen or operatives"[94] required to make workmen's compensation compulsory. That Act further limits its applicability with the requirement that the workers be employed "regularly in the same business, or in or about the same establishment. . ."[95] Such a phrase of limitation is found in several of the acts, and has been interpreted to refer not necessarily to a definite time of employment but rather to "the ordinary course or conduct of the business in question."[96] In the absence of specific provisions in the statutes to the contrary, it is not necessary that the employees be employed in the same place or the same business in order to bring the employer under the law.[97] However, the wording of our Law indicates that there must be the statutory minimum in each business or in each place of employment in order to place the employer under workmen's compensation.[98]

Mississippi, by the inclusion of the "regularly employed" provision, will probably avoid a problem that has plagued some of the states, where it has been held that even the most temporary employment of additional workers is sufficient to bring the employer under the law. In what seems to be a rather extreme holding, the Wisconsin Court in *Stapleton v. Industrial Commission*[99] decided that the hiring by a cheese manufacturer of three wood-cutters for one afternoon a year was sufficient to raise his employees to the statutory number and thus to bring him under the act.[100] The usual rule has been to exclude as casual workers those employees hired for a very brief time and for a purpose separate from the regular business of the employer.[101]

Generally it makes no difference that a member of an employer's family is included in the number required to make up the minimum number of

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[93]Horovitz, *op. cit. supra* note 7 at 185.

[94]Miss. Laws 1948, c. 354, § 3. Prof. Ethridge points out in his article that the Mississippi courts will probably follow the interpretation of the Ohio Court in State v. Deming, 66 Ohio St. 274, 33 N.E.2d 33 (1940), and make these terms synonymous with "employees". Ethridge, *supra* note 23, at 87.

[95]Miss. Laws 1948, c. 354, § 3.

[96]2 Schneider, *op. cit. supra* note 4 at 574. *See* Mobile Liners, Inc. v. McConnell, 220 Ala. 562, 126 So. 626 (1930); Schneider v. Raymond, 103 Conn. 49, 130 A. 73 (1925); Sorrentino v. Cersosimo, 103 Conn. 426, 130 A. 672 (1925); LaCroix v. Frechette, 50 R.I. 90, 145 A. 314 (1929).

[97]2 Schneider, *op. cit. supra* note 4 at 575.

[98]*See* Carswell v. Woodward Bros., 38 Ga. App. 152, 142 S.E. 907 (1928); Dillard v. Justus, 222 Mo. App. 362, 3 S.W.2d 392 (1928); Jackson v. United Cigar Stores Co., 228 Ala. 220, 153 So. 422 (1934); Vantrease v. Smith, 143 Tenn. 254, 227 S.W. 1023 (1921).

[99]249 Wis. 133, 26 N.W.2d 677 (1947).

[100]Of course, the employer had the privilege of withdrawing from the application of the Act when his employees again became fewer than the statutory number.

[101]Malone, *The Employer-Employee Relationship under the Louisiana Workmen's Compensation Act*, 8 La. L.Rev. 329 (1948).

employees.[102] The claimant usually has the burden of proving that the employer has sufficient employees to be brought under the act,[103] but experience has shown that most jurisdictions resolve the problem in favor of the claimant wherever possible in order that the compensation benefits may be extended to the greatest number of employees.[104]

Hazardous Employments

An exception found in the acts of at least eleven states, although not provided for in the Mississippi Law, is that which makes workmen's compensation benefits apply only to hazardous or extra-hazardous employments.[105] Such an exception has been attacked on a number of occasions, but in every instance the courts have held that a distinction of this sort is not unreasonable and is a valid exercise of the police power.[106]

The employments which are considered as hazardous must be specifically set forth in the law, for coverage is seldom extended to employers not directly named.[107] A question often arises where the employment encompasses both hazardous and nonhazardous duties. The problem seems generally to be resolved by holding that if the nonhazardous work was incidental to hazardous work, the employee is covered even if injured while performing a normally nonhazardous task. Oklahoma, however, has the additional requirement that the activity must be carried on for "pecuniary gain." The court of that state held in the case of *Blakely v. Hamby*[108] that an operator of a real estate business (nonhazardous) was not liable for injuries sustained by a painter (hazardous) in his employ, since the incidental, hazardous business of painting was not being carried on for pecuniary gain by the employer. The Oklahoma Reports contain numerous cases seeking to determine the border line between such employments.[109]

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[102] 2 SCHNEIDER, *op. cit. supra* note 4 at 576.

[103] Crevisour v. Hendrix, 234 Mo. App. 1012, 136 S.W.2d 404 (1936); McDonald v. Industrial Commission, 67 N.E.2d 806 (Ohio App. 1939); King v. Buckeye Cotton Oil Co., 155 Tenn. 491, 296 S.W. 3 (1927).

[104] Holmes v. Freeman, 150 S.W.2d 557 (Mo. App. 1941); Ogle v. Tennessee Eastman Co., 206 S.W.2d 909 (Tenn. 1947); Alabama By-Products Co. v. Landgraff, 32 Ala. App. 343, 27 So.2d 209 (1946), *aff'd*, 248 Ala. 253, 27 So.2d 215 (1946); Pacific Employers' Ins. Co. v. Gage, 199 S.W.2d 537 (Tex. Civ. App. 1947).

[105] Ill., La., Md., Mont., N.H., N.M., N.Y., Okla., Ore., Wash., and Wyo. *See* 2 SCHNEIDER, *op. cit supra* note 4 at 356

[106] *In re* Opinion of the Justices, 309 Mass 562, 35 N.E.2d 1 (1941); McNaught v. Hines, 300 Ill. 167, 133 N.E. 53 (1921); Kemper v. Gluck, 327 Mo. 733, 39 S.W.2d 330 (1931).

[107] Aylesworth v. Phoenix Cheese Co., 170 App. Div. 34, 155 N.Y. Supp. 916 (1915); Mayor & City Council of Baltimore v. Smith, 168 Md. 458, 177 A. 903 (1935); Koger v. A. T. Woods, Inc., *supra* note 28.

[108] 187 Okla. 251, 102 P.2d 581 (1940).

[109] Indian Hills Country Club v. Thomas, 178 Okla. 93, 62 P.2d 99 (1936); Carper v. Brandon, 195 Okla. 192, 156 P.2d 623 (1945); Wilde v. Physicians & Dentists Building Co., 197 Okla. 683, 174 P.2d 382 (1946). (A plasterer who fell down ele-

Although it is conceded that the benefits of workmen's compensation are felt most in hazardous and extrahazardous employments, still it is difficult to understand why an arbitrary exception should be made for those in industries which may be designated as nonhazardous.[110] An injury sustained in a so-called nonhazardous business carries with it just as much loss to a worker and, incidentally to the employer also, as a similar injury in a hazardous employment. It is believed that the Mississippi Act follows the proper course in refusing to recognize such an unnatural distinction. Certainly it will avoid much of the litigation which has risen to confound and confuse the commissions and courts of other states where the nonhazardous exception is recognized.

Contractors and Subcontractors

In a determination of the question as to who and what are employers in the contemplation of the various compensation acts, one inevitably encounters the problem of the status of independent contractors and subcontractors. As a general proposition it can be stated that most independent contractors, like most partners, are employers.[111] The courts and commissions, however, scrutinize most carefully all relationships involving purported independent contractors, and if there is evidence of an intent by an insured employer to avoid complete coverage by hiring an uninsured independent contractor, the liability is often fixed on the main employer.[112] The test which is usually applied to ascertain the true nature of such relation is the "right to control" test. If the main employer has the right to control the employees of the contractor or subcontractor, whether he acually exercises that control or not, it is usually held that he is an employer and must be ultimately responsible for workmen's compensation coverage.[113]

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vator shaft while returning from lunch could not recover compensation as an elevator operator!) For discussion of the law in Washington, see Comment, 23 Wash. L. Rev. 284 (1948).

[110]See Malone, *supra* note 46. He states in part: "It is not unlikely that the later disappearance of both political and constitutional objections has left the limitations to hazardous businesses without any substantial support in policy."

[111]*See* S. A. Gerrard Co. v. Industrial Accident Commission, 17 Cal.2d 411, 110 P.2d 377 (1941); Johnson v. Vincennes Bridge Co., 9 La. App. 173, 119 So. 539 (1928), *aff'd*, 167 La. 107, 118 So. 820 (1928); Birmingham Post Co. v. Sturgeon, 227 Ala. 162, 149 So. 74 (1933); Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721 (1916); Horovitz, *op. cit. supra* note 7 at 228.

[112]*See* Clarke v. M. W. Leahy Co. 300 Mass. 565 16 N.E.2d 57 (1938); Cozzo v. Atlantic Refining Co. 299 Mass. 260, 12 N.E.2d 744 (1938); Horovitz *op. cit. supra* note 7 at 232.

[113]Utah Fire Clay Co. v. Industrial Commission, 86 Utah 1, 40 P.2d 183 (1935); Associated Indemnity Corp. v. Insurors Indemnity & Ins. Co., 153 S.W.2d 533 (Tex. Civ. App. 1941). *See* Horovitz, *op. cit. supra* note 7 at 232.

A number of states have incorporated into their acts a provision fixing the liability of the principal employer in cases of this kind. The Mississippi Act contains the following paragraph:[114]

> In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

Such a provision reflects the trend towards greater coverage, and now only seven states do not consider the principal employer or contractor an insurer of the recovery rights of the employees of the subcontractor. To illustrate this attitude of the courts towards certainty of coverage, the Nebraska tribunal has held[115] that the main employer is liable for the subcontractor's employees even though the subcontractor had made an agreement in writing that he would insure and even though the Nebraska Act seemed to relieve the principal contractor from liability in such a case.[116] It is generally agreed, however, that there must be a contractual relationship between the contractor and the subcontractor,[117] and in the majority of states it is required that the employee be engaged in a part of the business of the main contractor, and in some jurisdictions even that the work be done on or about the premises of the main contractor.[118] Mississippi apparently follows the more limited view, for the above section of the Mississippi Act must be read in connection with Section 3, which was cited

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[114]Miss. Laws 1948, c. 354, § 4.

[115]Hiestand v. Ristau, 135 Neb. 881, 284 N.W. 756 (1939).

[116]"Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this article, shall be included in the term "employer" and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for. . . This section, however, shall not be so construed as to cover or mean . . . a contractor who, in good faith, lets to a subcontractor a portion of his contract, if . . . the principal contractor . . . requires the subcontractor . . . to procure a policy or policies of insurance . . . which . . . shall guarantee payment of compensation . . . to injured workmen." Neb. Comp. Stat., § 48-116 (1929). Other states with similar provisions are Ala., Ill., Minn., and Texas.

[117]Whitley v. Hillyer-Deutsch-Edwards, Inc., 142 So. 798 (La. App. 1932); Perkinson v. Thomas, 158 Va. 699, 164 S.E. 561 (1932); 2 Schneider, *op. cit. supra* note 4 at 176.

[118]Doherty's Case, 238 Mass. 456, 2 N.E.2d 186 (1936); Crane v. Peach Bros., 106 Conn. 110, 137 A. 15 (1927); Allen v. Babcock & Wilcox Tube Co., 356 Pa. 414, 52 A.2d 314 (1947); Truhlicka v. Beech Aircraft Corp., 162 Kan. 535, 178 P.2d 252 (1947); Green v. Shamrod, 185 S.W.2d 41 (Mo. App. 1944); Perrin v. American Theatrical Co., 352 Mo. 484, 178 S.W.2d 332 (1944).

The problem often arises as to what constitutes a part of the main employer's business. The following recent cases are illustrative of the dilemna which exists: Perrin v. American Theatrical Co., *supra* (theater owner not liable to employee of road show performing in theater); Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P.2d 701 (1945) (hotel liable to employee of company that contracted to wax floors of hotel); Green v. Shamrod, *supra* (laundry liable to equipment company's employee for injury sustained in installing water softening equipment).

earlier. The "workmen or operatives" must be "regularly in the same business" of the employer and "in or about the same establishment."[119] As pointed out above, though, the matter of control is the consideration most often taken into account.[120]

There are a number of theories as to the liability of the principal employer. In some jurisdictions he may be liable as a negligent third person, and this is notwithstanding the fact that under such a theory of recovery an employee of a subcontractor may have two independent courses for redress.[121] Under no circumstances, however, may an employee receive double satisfaction for the same injury.[122] In most of the states the statutes do not permit such common law action against the main employer. Other jurisdictions differ widely on the question of whether the workmen of the subcontractor must exhaust their remedy against him before they can seek to recover from the statutory employer, whether they may have their choice of remedies, or whether they may look to the principal contractor first.[123]

Since the Mississippi Act applies to those employers who have "in service eight or more workmen or operatives . . . under any contract or hire, express or implied,"[124] it can be seen that a problem may arise where neither the principal employer nor the subcontractor has as many as eight workmen. Among those jurisdictions where such a difficulty has been the subject of litigation, there is considerable conflict on the question. The weight of authority seems to be balanced very slightly in favor of not adding the employees of the subcontractor to those of the principal contractor in order to bring the latter within the act.[125] There are, however, a number of courts which have held conversely[126]—another reflection of the trend towards greater inclusiveness. A slight variation of the problem was presented in the Missouri case of *Pruitt v. Harker*,[127] where the court thought that employees of five different subcontractors should be added together to bring the one principal contractor within the act.

Another aspect of the employer problem stems from the situations

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[119]Miss. Laws 1948, c. 354, § 3.

[120]*Supra* note 111.

[121]McGann v. Moss, 50 F. Supp. 573 (W.D. Va. 1943); Sher v. Roth-Schenker Corp., 72 N.Y. Supp.2d 684 (App. Div. 1947); Blair v. Smith, 201 Ga. 747, 41 S.E.2d 133 (1947); Konstantino v. Curtiss-Wright Corp., 52 F. Supp. 684 (W.D. N.Y. 1943).

[122]Skakandy v. State, 188 Misc. Rep. 214, 66 N.Y. Supp.2d 99 (1946); Kowcun v. Bybee, 186 P.2d 790 (Ore. 1947).

[123]2 SCHNEIDER, *op. cit. supra* note 4 at 179.

[124]Miss. Laws 1948, c. 354, § 3.

[125]Jenkins v. Reichert. 125 Conn. 258, 5 A.2d 6 (1939); Kloman v. Industrial Commission, 181 Wis. 505, 195 N.W. 404 (1923).

[126]Maxwell v. Buck, 169 Tenn. 315, 87 S.W.2d 564 (1935); Younger v. Giller Contracting Co., 143 Fla. 335, 196 So. 690 (1940).

[127]328 Mo. 1200, 43 S.W.2d 769 (1931).

where an employer is actually an undisclosed agent for a principal. Usually the worker has an election to seek compensation against either the ultimate or the intermediate employer, and the agent, as an intermediate employer, assumes the role of independent contractor.[128] Where a servant is borrowed by one employer from another, the matter of liability as between the employers is a question which hinges on the facts of each case. The factors of control, payment of wages, and, in some cases, ownership of equipment and machinery used by the borrowed employee are indicia used in determining the relationship and are usually considered in a determination of ultimate liability for workmen's compensation.[129] In some jurisdictions it has been held that an employee has an election to look to either his original employer or his special employer for compensation,[130] while in other states the liability of the special and general employers is joint and several.[131]

Federal Coverage

The final sentence of Section 3 of the Mississippi Act reads as follows: "This Act shall not apply to transportation and maritime employments for which a rule of liability is provided by the laws of the United States." Such a simple statement of exclusion hardly tells the story, though, of the confusion which exists in ascertaining where the liability ends under state acts and begins under the various federal acts.

There are now three federal acts in operation: The Jones Act[132] for maritime employments, the Federal Longshoremen's and Harbor Workers' Act,[133] and the Federal Employers' Liability Act[134] for interstate railroads. The history of the enactment and administration of those pieces of legislation and their interpretation by the courts is an involved one. The oldest of the federal acts is the Federal Employers' Liability Act passed in 1908, which placed interstate railroad employers under a liability to their employees for negligent injuries suffered by the latter. The difficulty here has always been concerned with when the interstate nature of the activity com-

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[128]Horovitz, *op cit. supra* note 7 at 235. *See* Mobile Liners, Inc. v. McConnell, *supra* note 94.

[129]Campbell v. Connolly Contracting Co., 179 Minn. 416, 229 N.W. 561 (1930); Texas Employers' Ins. Ass'n v. Harrison, 207 S.W.2d 168 (Tex. Civ. App. 1947); DeMoss v. U. S. Fidelity & Guaranty Co., 207 S.W.2d 258 (Tex. Civ. App. 1947). Bisson v. Winnipesaukee Air Service, 13 A.2d 821 (N.H. 1940).

[130]Independence Indemnity Co. v. Industrial Accident Commission, 203 Cal. 51, 262 P. 757 (1928).

[131]Colonial Ins. Co. v. Industrial Accident Commission, 29 Cal.2d 79, 172 P.2d 884 (1946); Dennison v. Peckham Road Corp., 295 N.Y. 457, 68 N.E.2d 440 (1946).

[132]41 Stat. 1007 (1920), 46 U.S.C.A. § 688 (1940).

[133]44 Stat. 1424 (1927), 33 U.S.C. A. § § 901-950 (Supp. 1948).

[134]35 Stat. 65 (1908), as amended, 45 U.S.C.A. § § 51-60 (1940). See Delisi, *Scope of the Federal Employers' Liability Act—Recent Developments,* 18 Miss. L. J. 206 (1947).

menced. An amendment to the Act in 1939 seemed to make for greater inclusiveness with the provision that, "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce, or shall, in any way, directly or closely or substantially affect such commerce . . .," shall come under the Act. Thus, the doctrine of the now famous case of *Shanks v. Delaware Railroad,*[135] namely, that the activity at "the time of the injury" was the test of applicability, has given way to the test of the general nature of the employee's work. But, according to Horovitz, the other test established by the *Shanks* case—whether the employee was engaged in interstate transportation (not commerce)—apparently continues to apply in effect, despite the specific inclusion of the word "commerce" in the amendment of 1939.[136]

It seems something of an anomaly that interstate rail employers come under a federal act but that neither highway nor air carriers are affected. Still Congress has chosen to leave the compensation problem in these fields to the states, and with a few exceptions the states have provided for such interstate employments to come under state acts.

As may be expected, the reports abound with decisions attempting to show the way as to where the boundary is with reference to state and federal liability for railroad workers.[137] Quite frequently in states where compensation acts were elective as to railroad employers, the latter would insure only under the Federal Act, and leave their liability as to their "non-transportation" workers to be decided by the state's negligence laws. However, so many states have so limited the common law defenses that most carriers now feel it imperative to carry insurance on workers under both federal and state acts.[138]

In the two other fields of federal compensation coverage, equally as much confusion reigns. Ever since the decision in the *Jensen* case,[139] wherein the Supreme Court held in a highly controversial opinion that by virtue of the "admiralty and maritime jurisdiction" clause of the Constitution, no state compensation act could apply to a longshoreman working over water, even though on a gangplank only a foot from a dock. Prior to that time state acts had applied to all maritime and longshoremen employers on the theory that the place of the injury made no difference so

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[135]239 U.S. 556 (1916).

[136]Horovitz, *op. cit. supra* note 7 at 57.

[137]*See* Tipton v. Atchison, T. & S.F. Ry., 78 F.2d 450 (C.C.A. 9th 1935), *aff'd,* 298 U.S. 141 (1936); Mease v. Reading Co., 126 Pa. Super 436, 191 A. 402 (1937); Philadelphia & Reading Ry. v. DiDonato, 256 U.S. 326 (1921); Pedersen v. Delaware. Lackawanna & Western R.R., 229 U.S. 146 (1913).

[138]Horovitz, *op. cit. supra* note 7 at 53.

[139]Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

long as the employer was covered under a compensation act. The result of the *Jensen* case was the passage in 1920 of the Jones Act, which made the provisions of the Federal Employers' Liability Act applicable to maritime employments. Still when ships were in port, a question arose as to how far the Jones Act was intended to apply,[140] and in 1927 Congress enacted the Longshoremen's and Harbor Workers' Act to provide for dock workers only when state acts were not applicable.

Despite all of these efforts at clarification there remains a "twilight zone" where recovery may logically be had under either federal or state laws.[141] The dilemma was ably set forth by Justice Black in the case of *Davis v. Department of Labor:*[142]

> But employees such as decedent here occupy that shadowy area within which, at some undefinable point, state laws can validly provide compensation. This court has been unable to have any guiding, definite rule to determine the extent of state power in advance of litigation, and had held that the margins of state authority must 'be determined in view of the surrounding circumstances as cases arise.'

Consequently the courts have adopted the attitude that in view of such confusion a dual right of recovery should be recognized. It should be emphasized that double recovery does not exist, but a choice of rights does in cases where no clear-cut determination can be made as to which act applies.

Conclusion

While it is not an easy matter to foresee at this time all of the problems which the Commission will encounter in administering the Mississippi Act as a whole, it seems reassuringly certain from this brief glance into only one phase of the Law that no great difficulty will be experienced in applying the terms of the sections pertaining to employers. The Mississippi Law follows middle ground on most of the provisions relating to this

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[140]That a problem is still presented here is seen from an examination of the following cases: Tucker v. Branham, 151 F.2d 96 (C.C.A. 3d 1945); Henderson v. Jones, 110 F.2d 952 (C.C.A. 5th 1940); Puget Sound Navigation Co. v. Marshall, 31 F. Supp. 903 (W.D. Wash. 1940); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940).

[141]*See* Standard Dredging Corp. v. Henderson, 150 F.2d 78 (C.C.A. 5th 1945); Norton v. Gulf Refining Co., 94 F.2d 380 (C.C.A. 3d 1937); *Ex parte* Rosengrant, 213 Ala. 202, 104 So. 409 (1925), *aff'd*, 273 U.S. 664 (1927); O'Loughlin v. Parker, 163 F.2d 1011 (C.C.A. 4th 1947); Massman Construction Co. v. Bassett, 30 F. Supp. 813 (E.D. Mo. 1940).

[142]317 U.S. 249 (1942). For excellent discussion of this case, see Comment, 19 Wash. L. Rev. 32 (1944).

phase of workmen's compensation legislation and, with only one exception, maintains a position in keeping with other liberal features of the Act.

As was mentioned earlier, the apparent exclusion of all political agencies and instrumentalities represents the only expression in this section which is not at least partially consistent with the present-day tendency in this country towards greater coverage. On the other hand, the refusal to recognize the unnatural standard of hazardous and extra-hazardous employments, the requirement that the main employer be ultimately responsible for the coverage of the employees of a subcontractor, and the addition of working partners to the ranks of those embraced in the protection of the Act are all principles which stamp this phase of the Law as liberal and progressive.

William F. Winter.

EMPLOYEES COVERED UNDER THE MISSISSIPPI WORKMEN'S COMPENSATION ACT

Definitions

Compensation under the Mississippi Workmen's Compensation Law of 1948[1] is payable for disability or death of an employee from injury arising out of and in the course of employment, without regard to fault as to the cause of the injury.[2] Thus, a determination of who are employees covered by the law is one of the first inquiries of the lawyer interpreting the new legislation.

Statutory definitions of the word "employee" must control in compensation cases insofar as they tend to modify the common law governing master and servant.[3] The Mississippi Act defines an employee as follows:

> 'Employee' means any person, including a minor whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied.[4]

Such definitions should be construed broadly, in order to effectuate the purposes of the legislation.[5] But a liberal construction should not be resorted to for the purpose of extending the statute to persons not embraced by its terms.[6]

Two other words, "workmen" and "operatives," must be defined in connection with this inquiry, since employers having in service eight or more workmen or operatives are deemed employers for the purpose of administering the law.[7]

A workman has been defined as one employed in manual labor, skilled or unskilled, an artificer, mechanic, or artisan; an operative is a factory hand, one who operates machinery.[8]

Under the Mississippi Law an employer is covered who has in service eight or more *workmen or operatives;*[9] yet, compensation is payable for

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[1]Miss. Laws 1948, c. 354.
[2]*Id.*, § 4.
[3]Birmingham Post Co. v. Sturgeon, 227 Ala. 162, 149 So. 74 (1933).
[4]Miss. Laws 1948, c. 354, § 2(4).
[5]Allen-Garcia Co. v. Industrial Commission, 334 Ill. 390, 166 N.E. 78 (1929); *Re* Duncan, 73 Ind. App. 270, 127 N.E. 289 (1920); Costley v. Nevada Industrial Ins. Commission 53 Nev. 219, 296 P. 1011 (1931).
[6]Cornett v. Chattanooga, 165 Tenn. 563, 56 S.W.2d 742 (1933).
[7]Miss. Laws 1948, c. 354, § 3(1).
[8]Cohen v. Rosalsky, 230 App. Div. 604, 246 N.Y. Supp. 299 (1930).
[9]Miss. Laws 1948, c. 354, § 3(1).

disability or death of an *employee* from injury arising out of and in the course of employment.[10] Thus, it might seem that one standard, workmen or operatives, is set up in determining amenability of an employer to the law, while another standard, *i.e.* employee, is used to determine what persons are entitled to compensation. Such an interpretation of the law would probably in many cases defeat the purpose of compensation legislation in providing protection for injured workers and families of deceased workers, without regard to fault in the injury. This is true since an employer might have considerably more than eight employees, according to the definition of an employee above-quoted from the Act, and yet not be subject to its provisions because fewer than eight were engaged in manual or machine labor, according to the New York definitions of workmen and operatives in the *Cohen v. Rosalsky* case.[11]

Under the Ohio statute,[12] which is very similar to that of Mississippi, the Court of Appeals of that State has held that the terms "employee," "workman," and "operative" are used interchangeably. It was argued that different standards had been set up for determining amenability of employers from those set up for determining coverage of employees.[13] The decisions of the New York Court drawing a distinction in these terms were said to be inapplicable in Ohio, due to considerable difference in the compensation laws of the two states. It is doubtful that the legislature of Mississippi meant to set up separate standards, and a construction of the terms as interchangeable would better carry out the social purposes of the legislation. To hold otherwise would be to exclude countless employees not intended by the legislature to be excluded.

Necessity of an Employer-Employee Relationship, and Tests Thereof

Recovery under a workmen's compensation act must be predicated on an employer-employee relationship. This fact is jurisdictional, and must be found before an award can be made.[14] The elements which go to show the existence of such a relationship are: (1) exercise of control over the details of the work, (2) payment of compensation, (3) power of appointment, (4) power of dismissal, and (5) benefit from the work in question.[15]

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[10]Miss. Laws 1948, c. 354, § 4.

[11]*Supra* note 8.

[12]Ohio Gen. Code, § § 1465-60(2) & 1465-61.

[13]State *ex rel.* Herbert v. Deming, 66 Ohio App. 274, 33 N.E.2d 33 (1940). One difference in the Ohio situation and the Mississippi situation should be noted. The Ohio Constitution, Art. II, § 35, uses both terms, "workmen" and "employees." The opinion in Goldberg v. Industrial Commission 131 Ohio St. 399, 402, 3 N.E.2d 364 (1936), says those terms are there used interchangeably.

[14]Whitley v. Hillyer-Deutsch-Edwards, Inc., 142 So. 798 (La. App. 1932).

[15]Buhler v. Maddison, 109 Utah 267, 176 P.2d 118 (1947).

Necessity of Contract

The relation of employer and employee is commonly said to exist only by virtue of a contract, express or implied.[16] In fact, under Section 2(4) of the Mississippi Statute it is provided that a contract of hire or apprenticeship, written or oral, express or implied, is necessary to bring one under the definition of an employee. Interpreting a similar provision in the Tennessee Law, the Supreme Court of that State said: "By the definition quoted, the benefits which accrue to employer and employee under the Compensation Law, and the obligations arising therefrom, are incidents of a contract of employment."[17] The court went on to say that no action will lie, unless the parties are bound by contract, express or implied, and held that a city police officer was not protected as he did not hold office by contract with the governmental agency he served. His duties were created and imposed by law.

The United States Supreme Court has held, however, that workmen's compensation legislation rests upon the idea of status, not upon that of implied contract, that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital.[18]

Control

The most important test of the existence of the employer-employee relationship, and the one most commonly applied, is that of control. The claimant must be under the control and direction of the employer as to the details of his work in order to be entitled to compensation. In the case of *Gebers v. Murfreesboro Laundry Company,*[19] the court considered the question of whether or not a partner who received wages for his services was an employee for purpose of the act. The partner was not under the control of his employer, the partnership, and so was not entitled to recovery.

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[16]Humphries v. Boxley Bros. Co., 146 Va. 91, 135 S.E. 890 (1926).

[17]Cornett v. Chattanooga, 165 Tenn. 563, 56 S.W.2d 742 (1933).

[18]Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923). The court went on to say that "this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter,—a connection substantially contributory, though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern . . . to escape condemnation as arbitrary, capricious, or clearly unreasonable."

[19]159 Tenn. 51, 15 S.W.2d 737 (1929).

In an Arizona case[20] there was involved a statute providing that if *A* procures *B* to do certain work which is part of *A's* business, and retains control over the work, then *B* and all *B's* employees and subcontractors are, for purposes of the compensation act, employees of *A*. The court said:

> It is obvious that were this not so the beneficient [sic] purposes of the act could and would be easily defeated or evaded by unscrupulous employers through the aid of various dummy intermediaries. The statute therefore brushes aside all forms and subterfuges and provides that one just, simple, and definite test. If the work be part of the regular business of the alleged employer, does he retain supervision or control thereof? All other matters are of importance only as they throw light on this question.

And it is the right of control at the moment of injury that is material in ascertaining whether the relationship exists. Thus, where the plaintiff had contracted to do scaffolding work for the defendant in which the plaintiff himself controlled, but was injured while temporarily doing other work which he had contracted to do for defendant and which defendant controlled, compensation was due.[21]

Right to Discharge

Another test which is sometimes considered in determining whether or not the relationship is present in a given case is the right to discharge the alleged employee. If the employer possesses the right to do so, the relationship exists.[22]

Payment of Compensation

With regard to wages or compensation, an express or implied contract of employment must exist; services gratuitously performed create no liability. But a pecuniary consideration for services is not necessary. One may compensate for services by means of any property of value, or even by a return of services pursuant to agreement.[23] An agreed rate of wages is not necessary.[24]

An Alabama decision is to the effect that the payment of wages and a certain mode of payment are not essential to the existence of the relation,

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[20]Grabe v. Industrial Commission, 38 Ariz. 322, 299 P. 1031 (1931).
[21]Neitzke v. Kraft, 208 Wis. 301, 242 N.W. 163 (1932).
[22]*Ibid.*
[23]Gabel v. Industrial Accident Commission 256 P. 564 (Dist. Ct. App., Calif., 1927). See also to the effect that compensation is necessary: Buhler v. Maddison, *supra* note 15.
[24]Neitzke v. Kraft, *supra* note 21.

that the essentials of the relation under the common law rule are the voluntary rendition of service by the employee, its acceptance by the employer, and the employer's right to direct and control the employee.[25]

Commencement of Work

Some courts hold that work must be begun, else recovery under a compensation act will not be permitted. The Supreme Court of Illinois in *Baer's Express and Storage Company v. Industrial Board*,[26] held that entrance upon the performance of duties was a condition precedent to recovery. In that case the deceased had received a promise from defendant that he would be given a "steady job" on Monday morning. Prior to that he had been an occasional or casual employee. It was still incumbent upon claimant to show that this promise had been fulfilled, and that deceased had entered upon the performance of his part of the contract thus entered into. The mere fact that he was found injured in defendant's place of business was not alone sufficient to establish that the promise on the part of defendant had not been withdrawn, or that deceased had entered upon his employment under the contract.

In an Oregon case[27] plaintiff had been directed to go to defendant's camp near a certain town to begin work. He went to the camp on defendant's logging train. Within a very brief period of time after arrival at the camp, the accident occurred. He had not left the immediate vicinity of the train, had not reported to the foreman, was not upon the pay-roll, and never did do any work or receive any compensation. The court concluded that plaintiff was not engaged in the employment of defendant at the time he was hurt.

There is authority to the contrary, however, holding that the making of the contract establishes the relation, not the beginning of work.[28]

Nature of Employer's Business

The nature of the employer's business must be established in ascertaining whether there is a relation of employment. In a Louisiana case[29] the petition failed to state the business of the employer. The court held that such a statement was essential.

Duration and Termination of Relation

The duration of time of employment is not a controlling factor.[30]

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[25]*See* Sloss-Sheffield Steel & Iron Co. v. Crim, 219 Ala. 148, 121 So. 408 (1929).
[26]282 Ill. 44, 118 N.E. 412 (1917).
[27]Susznik v. Alger Logging Co., 76 Ore. 189, 147 P. 922 (1915).
[28]Wabnec v. Clemons Logging Co., 146 Wash. 469, 263 P. 592 (1928).
[29]Charity Hospital of Louisiana v. Morgan, 143 So. 508 (La. App. 1932).
[30]Neitzke v. Kraft, *supra* note 21.

The fact that the plaintiff has been discharged does not so sever the relationship of master and servant as to render the compensation act inapplicable, unless he has had a reasonable time to leave the premises.[31]

It has been held that the relationship exists during the interval between working hours. In a Louisiana case[32] the employer contended that the deceased was not an employee at death because he was employed from day to day, and each day's employment amounted to a separate contract, and because he was killed after the close of his working day. The court stated: "Whether he was paid by the day or by the week or by the month, he was in their employ."

In *Kinnard v. Gibson*[33] a court of appeal of Louisiana held that where plaintiff was a regular employee, but had been instructed not to work the day in question because of illness, he was not in defendants' employ at the time of the accident. Defendants had no knowledge he was working until the injury was suffered.

Specific Employees

Employees of a Subcontractor

The Mississippi Law provides:[34]

> In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

Under a similar provision the Oklahoma Court held the requirement to be met when the principal contractor had induced the subcontractor to secure compensation insurance.[35] The law of that state was that the employer must pay or provide for compensation for employees of a subcontractor.

Liability under our law is broad compared to that in some of the other states. In Connecticut for a principal employer to be liable to employees of a subcontractor the work in which the injury occurs must be a part or process in the trade or business of the principal employer, and must be performed on premises under his control.[36]

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[31]*See* W. B. Davis & Son v. Ruple, 222 Ala. 52, 130 So. 772, 774 (1930).
[32]Thompson v. Bradford Motor Freight Line, 148 So. 79 (La. App. 1933).
[33]172 So. 595 (La. App. 1937).
[34]Miss. Laws 1948, c. 354, § 4.
[35]Fox v. Dunning, 124 Okla. 228, 225 P. 582 (1927).
[36]Conn. Gen. Stat. § 5230. Also for similar provisions see Mass. Gen. Laws, c. 152, § 18 (Ter. Ed.); and Ga. Code Ann. § 54-657(f) (1941).

The New York case of *Passarelli v. Columbia Engineering and Contracting Company*[37] held that such a provision as the one under consideration applying to hazardous employments applies to a subcontractor and his subcontractor, as well as to a general contractor and his subcontractor.

The question arises as to whether the injured claimant must exhaust his remedy against his immediate employer before proceeding against the contractor. In a Connecticut case under a statute providing that the principal employer shall be liable for compensation just as though the work had been done by persons employed directly by him, where he has done the work through a subcontractor, the contention was advanced that the plaintiff must pursue his claim against his immediate employer and his insurer, that is the employer's insurer, before he could recover against the principal employer. The court held: ". . . Whenever an injured employee of a subcontractor receives a compensable injury he may pursue his remedy against his immediate employer or any one or more principal employers as thus defined, or against all in one proceeding."[38]

With regard to further procedural aspects of the question, under the similar statute in New York, applying to hazardous employments, the burden of proving that the subcontractor had secured insurance is placed upon the contractor, while the burden of proving the insurance carrier of the contractor to be liable was said to be on the employee.[39]

In *Mittan v. O'Rourke*,[40] it was held that a property owner who had let separate contracts with several mechanics for construction of a house for his own use was not a "contractor", and the mechanics were not "subcontractors" within the provisions of the section of the compensation act declaring contractors liable for compensation to a subcontractor's employees, where the subcontractor had not secured payment. The property owner was not liable to an employee of a mechanic who carried no compensation insurance.

Minors—Illegal Employments

In some states minors illegally employed are not covered under compensation laws, and therefore must resort to their common law remedies.[41] However, the Mississippi Law includes minors, whether lawfully or un-

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[37]270 N.Y. 68, 200 N. E. 583 (1936). *Accord:* Qualp v. James Stewart Co., 266 Pa. 502, 109 A. 780 (1920).

[38]Palumbo v. George A. Fuller Co., 99 Conn. 353, 122 A. 63 (1923).

[39]Monello v. Klein, 216 App. Div. 105, 214 N.Y. Supp. 486 (1926). There, since the insurance policy had not been produced, and had not been shown to protect such a claimant, the judgment against the carrier was reversed.

[40]115 N. J. Law 177, 178 A. 797 (1935).

[41]*See e.g.* Cox v. Hooven & A. Co., 250 Ky. 690, 63 S.W.2d 914 (1933).

lawfully employed;[42] hence the question of the legality of employment is of no consequence in determining the coverage of a minor.

At the same time Section 48 of the Act provides that compensation shall be doubled in the case of minors under eighteen employed, permitted, or suffered to work in violation of any provision of the labor law.[43] In this respect the question of legality of employment of course becomes very important.

Even in states where minors are not included within the express terms of the act, minors have been included by judicial decision.[44]

The Georgia statute, strikingly similar to Mississippi's in this wise, reads:

> 'Employee' shall include every person including a minor in the service of another under any contract of hire or apprenticeship. . . . Minors are included even though working in violation of any child labor law or other similar statute. . . .

In a 1930 case[45] it was held under the quoted statute that, whatever might be the rule in the absence of a plain provision of the statute, a minor though employed contrary to law was covered by the compensation act.

Florida, whose compensation law is of comparatively recent enactment and is in general similar to Mississippi's, has a provision corresponding to ours on double compensation for minors illegally employed. In a 1941 case a minor of seventeen years was injured while cleaning machinery in motion. A statute prohibited workers under eighteen being allowed to do such work. Award of double compensation was sustained.[46]

The Utah statute provides that no person under eighteen may be permitted to work until the boss has obtained an employment certificate; double compensation is allowed in instances of non-compliance. In *Royal Canning Corporation v. Industrial Commission,*[47] the defense raised was that the industrial commission requested the employer to secure employment for certain minors; that the requisite certificates were applied for simultaneously with the hiring, but were not at that time obtained because

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[42]Miss. Laws 1948, c. 354, § 2(4).

[43]The law of Mississippi as to child labor is found in MISS. CODE ANN. § 6985 *et. seq.* (1942).

[44]*See e.g.* Gilley v. Aetna Life Ins. Co., 35 S.W.2d 136 (Tex. 1931); Wells v. Radville, 112 Conn. 459, 153 A. 154 (1931); Pierce's Case, 267 Mass. 208, 166 N.E. 636 (1929).

[45]Horn v. Planters Products Co., 40 Ga. App. 787, 151 S.E. 552 (1930).

[46]Bituminous Casualty Corp. v. Clements, 3 So.2d 865 (Fla. 1941). *Accord:* Podola v. Crescent Box. Mfg. Co., 256 App. Div. 1016, 10 N.Y. Supp.2d 576 (1939).

[47]101 Utah 323, 121 P.2d 406 (1942).

the issuing officer was not available. The defense was denied because there was a knowing violation of the statute, intended for the protection of minors.

Double compensation has been awarded even though the employee secured employment through misrepresentation.[48] Misrepresentation by an illegally employed minor does not estop him from recovering increased compensation. The object of the provision is to conserve the health and morals of children in the interest of the general welfare.[49]

In the *Bloomer* case[50] the minor presented a statement purportedly signed by his father to the effect that he was eighteen, and on the strength of that the son was employed. The court held that the purpose of the child labor legislation is to protect children, and the court would not place such an interpretation on the workmen's compensation act as would circumvent the provisions of the labor law. The Wisconsin Law provides that the compensation commission may issue certificates as to age, and such a certificate is conclusive evidence of age in all compensation and labor law proceedings.

However, no commission-issued certificate was involved in the case cited.[51] In *Kenez v. Novelty Compact Leather Company,*[52] the court held that a minor employed without having first obtained a school certificate was an employee. The court there also discussed the argument of cases reaching an opposite result, saying that they held to the view that the legislature in defining employees must be assumed to have meant only those serving under legitimate contracts of hiring, but criticized this view by saying that the lawmaking bodies did not regard minors serving under contracts not in accordance with law as in any real sense wrongdoers.

The Workmen's Compensation Act of Wisconsin has a provision for treble compensation to minors illegally employed. The Wisconsin court has held[53] that the burden of showing that the employment is illegal is upon the minor.

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[48]Bloomer Brewery, Inc. v. Industrial Commission, 239 Wis. 605, 2 N.W.2d 226 (1942); Braiter v. Addie Co., 256 App. Div. 882, 9 N.Y. Supp.2d 280 (1939).

[49]Bloomer Brewery, Inc. v. Industrial Commission, *supra* note 48.

[50]*Supra* note 48.

[51]The *Bloomer* case points out a distinction in the Wisconsin law and the Michigan law, a Michigan case having been relied on by the lower court in holding the Wisconsin minor not entitled to increased award. (The Wisconsin act provides for *treble* payments to minors illegally employed.) "The Michigan law as quoted in the reports provides in effect that double compensation shall not be awarded a minor making 'fraudulent use of permits or certificates of age, in which case only single compensation shall be paid.' Comp. Laws Mich. 1929, § 8413." Bloomer Brewery, Inc. v. Industrial Commission, 239 Wis. 605, 2 N.W.2d 226 (1942).

[52]111 Conn. 229, 149 A. 679 (1930).

[53]Hills Dry Goods Co. v. Industrial Commission, 217 Wis. 76, 258 N.W. 336 (1935).

A case contrary to the majority view is *Weber v. J. E. Barr Packing Corporation,*[54] declaring the case not cognizable under the compensation act, where the minor was below the specified age allowed by law for the particular employment.

Officers and Stockholders of Corporations

Officers and stockholders of corporations, as such, are not entitled to compensation because they are not employees.[55] But holding of stock or an official position does not, per se, deprive one of the right to benefits, if he performs services as an employee independent of his office or in addition to owning an interest.[56]

The case of *Wolfe, Inc. v. Wolfe,*[57] is illustrative. There the president of a corporation was awarded compensation. He owned ninety-two of the 100 shares of stock. But he also performed full-time services about the business, a retail electrical appliance store, on the same basis as other employees, and received a monthly salary for his services as an employee, in addition to dividends and a bonus based on profits, but received no salary as president. At the time of injury he was doing his work as an employee, returning from a buying trip. He testified that his work as president was a very small part of his effort toward the whole business, that he did not control policies, and that the corporation had power to discharge him. The Florida statute defines employees thus:

> The term 'employee' means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also including minors whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer.[58]

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[54]182 Minn. 486, 234 N.W. 682 (1931).

[55]Ryan v. State Auto Parts Corp., 255 Ill. App. 422 (1930); Higgins v. Bates Street Shirt Co., 129 Me. 6, 149 A. 147 (1930); Donaldson v. William H. B. Donaldson Co., 176 Minn. 422, 223 N.W. 772 (1929); Erickson v. Erickson Furniture Co., 179 Minn. 304, 229 N.W. 101 (1930); Brown v. Conway Electric Light & P. Co., 82 N.H. 78, 129 A. 633 (1925); Hodges v. Home Mortgage Co., 201 N.C. 701, 161 S.E. 220 (1931); Carville v. A. F. Bornot & Co., 288 Pa. 104, 135 A. 652 (1927).

[56]Wolfe, Inc. v. Wolfe, 154 Fla. 633, 18 So.2d 535 (1944); Stevens v. Industrial Commission, 346 Ill. 495, 179 N.E. 102 (1931); Grigliono v. Hope Coal Co., 125 Kan. 581, 264 P. 1051 (1928); Staples v. Henderson Jersey Farms, Inc., 181 So. 48 (La. App. 1938); Higgins v. Bates Street Shirt Co., *supra* note 55; Emery's Case, 271 Mass. 46, 170 N.E. 839 (1930); Adam Black & Sons v. Court of Common Pleas, 8 N.J. Misc. R. 442, 150 A. 672 (1930).

[57]154 Fla. 633, 18 So.2d 535 (1944).

[58]Fla. Stat. § 440.02(2) (1941).

The Florida Supreme Court held: "The ownership of stock or holding an office in a private corporation is not inconsistent with the quoted statute [*i.e.,* the one above]."

In an Illinois case[59] the plaintiff, stockholder and manager of a corporation, was injured while at another company's place of business to examine some trucks under consideration for purchase by his company. The court held that he was performing his duties as manager, and was not acting as an employee but rather in the capacity of an officer. He did not meet the requirements of the compensation act, but recovered damages at common law.

Where an officer or stockholder was killed while performing employee duties independent of his position as officer or stockholder, his dependents were allowed recovery under the Louisiana Act.[60]

Such cases may turn on whether the duties being performed were part of the ordinary duties of an officer,[61] or on whether the nature and quality of the acts were such as would fall within the ordinary duties of a workman.[62]

As to the reason behind the rule that officers and stockholders are not protected under compensation acts, the New Hampshire court had this to say:[63]

> . . . The legislation was not passed in their interest. Their need of such relief as the act gives is negligible compared with the need of ordinary workmen and the latters' dependents.

It has been held to be necessary that an officer who claims as an employee draw remuneration for his services as employee distinguishable from the salary he receives as an officer.[64] Where an office-stockholder was carried on the payroll as an employee and injured while doing mechanical labor, the court said that she was an employee within the act She received weekly wages as an employee and not as stockholder or officer.[65]

A slightly different wrinkle is supplied by *Grigliono v. Hope Coal Company,*[66] in that the injured stockholder received a share of the profit for working the defendant's mine and doing other work, instead of regular

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[59]Ryan v. State Auto Parts Corp., *supra* note 55.
[60]Staples v. Henderson Jersey Farms, Inc., *supra* note 56.
[61]Stevens v. Industrial Commission, *supra* note 56.
[62]Hodges v. Home Mortgage Co., *supra* note 55.
[63]Brown v. Conway Electric Light & P. Co., *supra* note 55.
[64]Weiss v. Baker-Weiss Packing Box Co., 201 App. Div. 97, 193 N.Y. Supp. 800 (1922).
[65]Emery's Case, *supra* note 56.
[66]*Supra* note 56.

wages. The fact that plaintiff was a stockholder did not destroy his right to become an employee and receive compensation from defendant, which was an entity separate and apart from its shareholders.

Partners

The majority rule is that a partner may not recover under compensation acts for injuries received while doing work for the firm.[67] To hold otherwise would be to place the partner in the inconsistent attitude of being both employer and employee.[68] There can be no liability of a partnership toward a partner, because he would be liable to himself along with the other partners.[69] The rule as stated applies, notwithstanding a partner is paid a definite salary or wages for his services, in addition to his part of profits.[70]

One case[71] mentioned the control test, stating that control of the employee by the employer is essential to a recovery, and denied recovery to a partner. The plaintiff in another case[72] contracted with his co-partners to devote his entire time to firm affairs and to act as foreman on its construction projects. While so acting he was injured. The court held he was not an employee, even though he received regular wages for his services as foreman, in addition to a share of profits because of his interest in the firm. The court stated that he could not be in the dual role of employer and employee, and that the fact that he received wages was but an incident to the partnership contract, common in such transactions.

On the other hand, Oklahoma has held that a partner has the same compensation rights as an employee not a partner.[73] In one case the four partners did all the work; the court said that this fact in no way increased the carrier's risk.[74]

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[67]*In re* W. A. Montgomery & Son, 91 Ind. App. 21, 169 N.E. 879 (1930); Wallins Creek Lumber Co. v. Blanton, 228 Ky. 649, 15 S.W.2d 465 (1929); Lyle v. H. R. Lyle Cider & Vinegar Co., 243 N.Y. 257, 153 N.E. 67 (1926); Le Clear v. Smith, 207 App. Div. 71, 202 N.Y. Supp. 514 (1923); McMillen v. Industrial Commission, 13 Ohio App. 310 (1920); Gebers v. Murfreesboro Laundry Co., 159 Tenn. 51, 15 S.W.2d 737 (1929); and Millers' Indem. Underwriters v. Patten, 238 S. W. 240 (Tex. Civ. App. 1922).

[68]Wallins Creek Lumber Co. v. Blanton, *supra* note 67; Lyle v. H. R. Lyle Cider & Vinegar Co., *supra* note 67; McMillen v. Industrial Commission, *supra* note 67; and *see* Millers' Indem. Underwriters v. Patten, *supra* note 67.

[69]*See* Millers' Indem. Underwriters v. Patten, *supra* note 67.

[70]Wallins Creek Lumber Co. v. Blanton, *supra* note 67; Le Clear v. Smith, *supra* note 67; Gebers v. Murfreesboro Laundry Co., *supra* note 67.

[71]Gebers v. Murfreesboro Laundry Co., *supra* note 67.

[72]McMillen v. Industrial Commission, *supra* note 67.

[73]Knox v. Knox, 120 Okla. 45, 250 P. 783 (1925); Ardmore Paint & Oil Products Co. v. State Industrial Commission, 109 Okla. 81, 234 P. 582 (1925); and Ohio Drilling Co. v. State Industrial Commission, 86 Okla. 139, 207 P. 314 (1922).

[74]Ohio Drilling Co. v. State Industrial Commission, *supra* note 73.

The Mississippi Act provides:[75]

> Any member of a partnership, firm or association, or officer of a corporation who regularly performs manual labor in or about an establishment, shall be considered a workman or operative in determining whether or not such person, firm or private corporation, or public service corporation, has in its service eight or more workmen.

It is suggested that this provision is not intended to render the members or officers named employees for the purpose of paying them compensation, but rather that it is simply a rule to be used in computing the number of employees in order to determine whether a given employer is subject to the Act.

Substitutes, Helpers, and Assistants

It frequently happens that a person will work as a substitute temporarily for another employee without any contract of hire, and sometimes without the knowledge of the employer. Such persons' rights usually depend on the employer's knowledge of or consent to the substitution or assistance.

In a case where the claimant had substituted for a regular employee, and while actually performing work in the interest of the business, sustained injury, the court said:

> . . . Courts have uniformly refused recovery under workman's compensation statutes, unless it was established by the facts of the cases that the substitution was made with the knowledge, consent or acquiescence of the employer, or some authorized agent. It would seem, therefore, that the requirement of an actual contract of employment, either express or implied, has been broadened to include mere knowledge of the substitution on the part of the employer or one of his authorized agents. The courts have construed such knowledge to imply an acquiescence or consent, which would be accepted in lieu of an actual agreement of employment.[76]

The rule expressed by the *Gentry* case[77] seems to be as far as the courts have gone in the direction of allowing recovery by this class of individuals. The general rule is that a contract of employment is required to bring an injured employee within the terms of the act, where he was sub-

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[75]Miss. Laws 1948, c. 354, § 3(1).
[76]Gentry v. Peterson, 19 So.2d 623 (La. App. 1944).
[77]*Ibid.*

stitute, helper, or assistant.[78] An implied contract will suffice, however.[79]

The words "employer" and "employee" denote a contractual relation, not a mere casual voluntary rendition of a slight service or favor rewarded by a gratuity.[80] Receipt of gratuities for services does not result in a contract of employment.[81] A plaintiff in a New York case[82] had performed errands and odd jobs at the instance of defendant's superintendent two or three times monthly, being compensated from the superintendents's own funds in such amounts as the latter felt were proper. The injury resulted while plaintiff was cleaning an elevator cable, after being asked to do so by the superintendent. The relationship of employer and employee was not contemplated, according to the circumstances found by the court.

In many cases the fact that no compensation was to be received has had a bearing on denial of recovery. One such case[83] posed this situation: claimant had never received or asked for wages and did not expect any in the instance in which injured; the services in question were performed at the request of a company engineer, claimant not being a regular employee. The finding was that there was no employer-employee relationship. Where, in another case,[84] plaintiff was substituting for his brother at the latter's request and commenced work without notice to any agent of defendant, and without claiming any wages except from the brother, the court held the plaintiff was not an employee.

Relatives of Employers

The ratio decidendi of these types of cases, usually involving spouses and unemancipated children, has been: (1) there could be no recovery because the parent suing could sustain no liability to himself; or (2) there could be no liability without a contract of employment, and the employer could not contract with his or her spouse or minor child for services.

The unemancipated seventeen-year-old son of an employer was paid on the regular basis, though he lived at home and worked only after school and in the summer. "Liability, under the common law and under every

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[78]Wells County v. Merritt, 81 Ind. App. 488, 143 N.E. 711 (1924); Ferro v. Leopold Sinsheimer Estate, 256 N.Y. 398, 176 N.E. 817 (1931); Rockefeller v. Industrial Commission, 58 Utah 124, 197 P. 1038 (1921); and Hogan v. State Industrial Commission, 86 Okla. 161, 207 P. 303 (1922).

[79]Herron v. Coolsaet Bros., 158 Minn. 522, 198 N.W. 134 (1924); and Ranson-Rooney v. Overseas Ry., 17 La. App. 205, 134 So. 765, 768 (1931).

[80]Ferro v. Leopold Sinsheimer Estate, *supra* note 78.

[81]*Ibid.*

[82]*Ibid.*

[83]State *ex rel.* Albert Lea Packing Co. v. Industrial Commission, 155 Minn. 267, 193 N.W. 450 (1923).

[84]Wells County v. Merritt, *supra* note 78.

statutory definition that we can recall, has always contemplated different persons on the right and duty side of the relationship," the Supreme Court of Wisconsin said.[85] Recovery by his parents under the compensation act was denied.

In a Massachusetts case[86] a wife, cashier and bookkeeper for her husband, receiving regular wages, was injured within the premises occupied by the store, while she was going home. The statute defined employee as "every person in the service of another, under any contract of hire, express or implied, oral or written."[87] Under Massachusetts law a married woman cannot make a contract, express or implied with her husband.[88] The decision was that a wife working for her husband is not within the scope of the definition of employee. One cannot be an employee without a contract.

Fortner v. Industrial Commission[89] involved the claim of a mother against a father, who was the employer of their son killed in his work. The son had paid his mother ten dollars per week, while the actual cost of his board was four or five dollars. His mother had been a nurse, and the son had agreed to buy half of her clothes, if she would quit nursing. There was no evidence that the father did not discharge his legal obligation to support the mother. The holding was that such payments by the son did not bring the case within the intent of the compensation act.

Keller v. Industrial Commission[90] held that a mother, who was totally dependent on her son, might recover compensation from the father. There, even though the father-employer owned the business, which consisted of two teams engaged in hauling garbage for the city, the entire income was consumed in business expenses, and the son's wages were the only income the mother had. The court there said: "From this statutory duty—this obligation imposed by law [to pay compensation]—there was implied in law a promise to perform it which was contractual in its nature." The court distinguished this case from the *Fortner* case on the ground that Mrs. Fortner was not even partially dependent on the deceased son, and said that the two cases were alike only in that in each the employer was husband of claimant.

An unusual decision in this respect was rendered in Louisiana.[91]

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[85]Thomas v. Industrial Commission, 243 Wis. 231, 10 N.W.2d 206 (1943). *Accord:* Independence Indem. Co. v. Industrial Commission, 209 Wis. 109, 244 N.W. 566 (1932).

[86]Humphrey's Case, 227 Mass. 166, 116 N. E. 412 (1917). *Accord:* Aetna Life Ins. Co. v. Industrial Accident Commission, 175 Cal. 91, 165 P. 15 (1917).

[87]Humphrey's Case, *supra* note 86.

[88]*Ibid.*

[89]312 Ill. 327, 143 N.E. 845 (1924).

[90]350 Ill. 390, 183 N.E. 237 (1932).

[91]McLain v. National Mutual Casualty Co., 28 So.2d 680 (La. App. 1946).

There the contention was that the husband could not recover compensation, where he was injured while working in the wife's sawmill, because under Louisiana law husband and wife cannot enter into a contract of employment. It was held that the defendant, having accepted and retained premiums calculated on the basis of a pay-roll on which the name of plaintiff was included as an employee, could not avoid liability on the ground that a wife could not employ her husband. This type of situation is provided for in Section 34 of the Mississippi Act:

> *Acceptance of premium by Carrier an Estoppel.* Acceptance of a premium on a policy securing to an employee compensation, either alone or in connection with other insurance, shall estop the carrier so accepting from pleading that the employment of such employee is not covered under the act or that the employment is not carried on for pecuniary gain.

Volunteers

Most persons in a volunteer capacity are not eligible for compensation.[92] It may happen, however, that one who might otherwise be considered a volunteer may be held an employee and his dependents entitled to compensation, where he is employed by defendant's agent in an emergency situation, in which it is within the scope of the agent's authority to employ assistance.[93]

Independent Contractors

The universal rule is that independent contractors are not employees eligible for payments under workmen's compensation legislation. Some states have specifically excluded them from the benefits of their acts.[94] It often becomes very difficult here, as in agency cases, to distinguish between independent contractors and employees, and in general the same tests are used in both types of cases.[95] Some of these tests will be discussed below.

As stated before, the statute is to be construed liberally to the end that its humane purposes may be furthered; but its provisions are not to be

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[92]HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 203 (1944).

[93]Ranson-Rooney v. Overseas Ry., *supra* note 79.

[94]*E.g. see* Clements v. Luby Oil Co., 170 La. 910, 129 So. 526 (1930); Arthur v. Marble Rock Consolidated School District, 209 Iowa 280, 228 N.W. 70 (1929).

[95]Clements v. Luby Oil Co., *supra* note 94, quotes the Louisiana statutory definition of independent contractor as follows: "The term 'independent contractor' shall be considered to mean, for the purpose of this act, any person who renders service, other than manual labor, for a specified recompense for a specified result either as a unit or a whole, under the control of his principal as to results of his work only, and not as to the means by which such result is accomplished."

extended to cover persons or occupations not within its scope and intent.[96]

"The law indulges no presumption that an employee is either a servant or an independent contractor, and the burden is upon the party having the affirmative of the issue to show the relation to be such as to entitle him to recover."[97] Where the question is disputed, it is a matter for determination by the trier of fact.[98]

The most widely used and important test in determining whether a person is an independent contractor or an employee is the usual one in agency cases: control exercised by the employer over the work. If the workman is under the control of the employer, he is an employee or servant; if he is not under such control, he is an independent contractor.[99] "The ultimate question is not whether the employer actually exercises such control, but whether he has the right to control."[100]

Although the rule is as stated, that the master must retain the right to direct the way the work is done in order to create a master-servant relationship, such inspection or supervision as may be necessary to insure the desired ultimate result is not sufficient to change the status of the parties or the character of the contract from an independent one to one of master and servant.[101]

> There are many facts and circumstances to be considered in distinguishing between the servant and an independent contractor such as furnishing of workmen and appliances, mode and time of payment, power to terminate the contract, and the nature of the workman's occupation or calling. But they all relate back to the 'vital test,' the control over the work.[102]

Whether a person performing labor or service for another occupies the status of independent contractor may be determined in part from the char-

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[96]Birmingham Post Co. v. Sturgeon, *supra* note 3, citing 1 SCHNEIDER, WORKMEN'S COMPENSATION 161 (2d. ed. 1932).

[97]Industrial Commission v. Laird, 126 Ohio St. 617, 186 N.E. 718 (1933). *Accord:* Birmingham Post Co. v. Sturgeon, *supra* note 3.

[98]Industrial Commission v. Laird, *supra* note 97.

[99]Birmingham Post Co. v. Sturgeon, *supra* note 3; Bristol & Gale Co. v. Industrial Commission, 292 Ill. 16, 126 N.E. 599 (1920); Industrial Commission v. Laird, *supra* note 97; Arthur v. Marble Rock Consolidated School District, *supra* note 94; and Clements v. Luby Oil Co., *supra* note 94.

[100]Industrial Commission v. Laird, *supra* note 97. *Accord:* Birmingham Post Co. v. Sturgeon, *supra* note 3; and Bristol & Gale Co. v. Industrial Commission, *supra* note 99.

[101]Carleton v. Foundry & Machine Products Co., 199 Mich. 148, 165 N.W. 816 (1917); and Arthur v. Marble Rock Consolidated School District, *supra* note 94.

[102]Industrial Commission v. Laird, *supra* note 97.

acter of the labor or service performed.[103] In *Vascocue v. Collins*[104] plaintiff was to receive a definite amount of money to perform a definite line of work in the interest of a specific result, *i.e.* building a residence. He was held to be an independent contractor.

That the claimant's personal services were not contracted for has been held an indication of independent contractorship.[105] And the right of substitution is a very pertinent fact in determining the status of the person in question.

The contract made by the parties must be considered in determining whether the claimant is employee or independent contractor.[106] In *Arthur v. Marble Rock Consolidated School District*[107] the deceased, while under contract to carry children for the school, was injured. The Iowa statute excluded independent contractors from its definition of workmen or employees.[108] The deceased was held to be an independent contractor.

"The fact that the employer may at any time terminate the performance of the work by discharging the employee is of considerable weight as tending to show that the employee is not an independent contractor."[109] The power to terminate the employment at any time is incompatible with the full control enjoyed by independent contractors, and is a strong circumstance tending to show the subserviency of the employee.[110] The power to discharge without liability for breach of contract is significant.[111]

If the petitioner's duties with the defendant are continuously performed, that is a circumstance indicating an employment rather than an independent contract. In *Bristol and Gale Company v. Industrial Commission*[112] the deceased hauled freight for defendant; gave all of his time; was constantly subject to its orders and control; worked for no one else; and performed duties continuously. An award to his dependent was upheld.

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[103]Vascocue v. Collins, 150 So. 414 (La. App. 1933); Industrial Commission v. Laird, *supra* note 97.

[104]*Supra* note 103.

[105]Carleton v. Foundry & Machine Products Co., *supra* note 103.

[106]Arthur v. Marble Rock Consolidated School District, *supra* note 94; and Vascocue v. Collins, *supra* note 103.

[107]Arthur v. Marble Rock Consolidated School District, *supra* note 94.

[108]*Ibid.*

[109]Bristol & Gale Co. v. Industrial Commission, *supra* note 99. *Accord:* Industrial Commission v. Laird, *supra* note 97; Arthur v. Marble Rock Consolidated School District, *supra* note 94.

[110]Industrial Commission v. Laird, *supra* note 97.

[111]Arthur v. Marble Rock Consolidated School District, *supra* note 94.

[112]292 Ill. 16, 126 N.E. 599 (1920) (by implication).

Duration of work is to be distinguished from continuity of work as a test. If the plaintiff or claimant was hired for an indeterminate period rather than for a particular job, this indicates he is an employee.[113]

The fact that the person furnishes tools or materials points toward the situation of an independent contractor.[114] However, this test seems to be of less weight than most of the others.

The mode of payment is an important element to be considered.[115] If the plaintiff was to receive a definite amount of money to accomplish a specified result, he is an independent contractor.[116]

The fact that a claimant paid his own expenses is a circumstance indicating an independent contractor. In one case[117] the fact that the expenses were taken care of by the person in question was mentioned along with other circumstances in reaching this result.

Exclusions

The Mississippi Act has this provision:

> Domestic servants, farmers and farm labor are not included under the provisions of this act, but this exemption does not apply to the processing of agricultural products when carried on commercially.[118]

Domestic Servants

> It is clear that the origin of the exception was not to exclude large groups of commercial workers. They were omitted 'because there is no tangible, commercial product of domestic service,—it ministers only to the necessity, comfort and convenience of the employer.'[119]

A recognized authority has stated that there are three essentials to excluding a worker as a domestic: "(1) a householder who is a natural human being to whose comfort or convenience (2) a domestic servant

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[113]McKinstry v. Guy, 116 Kan. 192, 225 P. 743 (1924).

[114]Clements v. Luby Oil Co., *supra* note 94; Industrial Commission v. Laird, *supra* note 97; Flickenger v. Industrial Accident Commission, 181 Cal. 425, 184 P. 851 (1919); Bristol & Gale Co. v. Industrial Commission, *supra* note 99.

[115]Industrial Commission v. Laird, *supra* note 97; Bristol & Gale Co. v. Industrial Commission, *supra* note 99; and Vascocue v. Collins, *supra* note 103 (by implication).

[116]Vascocue v. Collins, *supra* note 103 (by implication).

[117]*Supra* note 114.

[118]Miss. Laws 1948, c. 354, § 3(1).

[119]Horovitz, *op. cit. supra* note 92, at 209, citing Tunnicliff v. Bettendorf, 204 Iowa 168 (1927).

caters by doing (3) work recognized through the years as constituting the work of such a menial."[120]

In most jurisdictions the term "domestic servants" and similar terms have been restricted to dwelling home servants, as differentiated from those of clubs and hotels. Exclusions which reduce workers' rights should be construed strictly, but without straining the natural meaning of the statute.[121]

Farmers and Farm Labor

One must consider the whole character of the employment in ascertaining whether the claimant is employed in farm labor, rather than consider simply the present task or the site of performance.[122] The controlling consideration is the nature of the work the injured person was hired to do on the employer's premises.[123]

A New York case[124] presented a situation where the claimant was employed as a dairy farm hand, his duties never required him to leave the premises, and he performed the usual duties of a farm hand. He was injured while cutting kindling on the farm with a buzz saw. The court found that cutting the wood did not change his position, and that he was excluded from compensation because he was a farm laborer. His entire time was devoted to farm labor on the farm where he lived.

Orchard workers are included in the terms agricultural laborer, farm laborer, or phrases of similar import.[125] Yet in *Maryland Casualty Company v. Dobbs*[126] the injured person was independently employed by an independent contractor in spraying fruit trees. He was held not to be a farm laborer within the compensation act. He was too far removed from the tilling of the soil and the cultivation of the trees.

> A farmer's employee who is engaged in delivering a farm product to the market or to a buyer, is employed in the farming business; but a manufacturer's employee who is engaged in de-

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[120]*Id.* at 211.
[121]*Id.* at 210.
[122]Mundell v. Swedlund, 59 Idaho 29, 80 P.2d 13 (1938).
[123]Holmes v. Travelers Ins. Co., 148 S.W.2d 270 (Tex. Civ. App. 1941).
[124]Davis v. Ryan, 262 App. Div. 982, 30 N.Y. Supp.2d 17 (1941).
[125]Tison v. Hyer, 153 Fla. 769, 16 So.2d 437 (1943). The Florida law uses the term "agricultural farm laborer." The claimant in question was injured while pruning the employer's orange trees. The court said: "Many courts have construed agricultural labor, farm labor, or words of similar import to embrace work done on the grove or orchard. Especially would such an interpretation be proper in this state where most of the groves are owned and cultivated in connection with the farm and each is a part of the other."
[126]128 Tex. 547, 100 S.W.2d 349 (1937).

livering a farm product to his employer's factory for conversion into a manufacturer [manufactured?] product is employed in the manufacturing business.[127]

In the *Robichaux* case[128] the employer, a sugar manufacturer, was engaged both in farming and in manufacturing. The sugar it sold was made from sugar cane produced on its plantations and was manufactured in its factories. The plaintiff was employed on a plantation, and yet was held to be occupied in the manufacturing end of the business. His duties began, the court said, after the farming process had been completed. The cane had been cut and was lying on the ground. The plaintiff entered at this point, his duty being to pile the cane so that it could be picked up and sent on to the factory. His service was the initial step in delivering the cane to the mill.

Where defendant is engaged in two types of operations, one of which —operating a gin—is covered by the compensation act and the other—farming—is not covered, a claimant injured in farming may not recover under the act, even though he had previously been engaged in the protected occupation of ginning.[129] In the case cited defendant's primary business was farming. It operated a plantation on which was located a cotton gin. Plaintiff, a farm hand employed at a daily wage, was injured while driving a tractor. Plaintiff's duties consisted of plowing, hoeing, running tractors, and working at the gin during the ginning season. Operation of the gin for a few weeks each year was said to be independent of the farming operations. There was no causal connection between service at the gin and the injury.

*Fred Witty**

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[127]Robichaux v. Realty Operators, Inc., 195 La. 70, 196 So. 23 (1940).
[128]*Ibid.*
[129]Williams v. Westdale Corp., 3 So.2d 684 (La. App. 1941).
*Attorney at Law; Greenwood, Miss.

Workmen's Compensation—Accident or Injury—Effect of Pre-Existing Disease or Physical Defect

Plaintiff's husband, an employee of defendant, died due to a combination of strain, exertion, heat, and pre-existing heart disease, while in discharge of his duty of firing two boilers. Plaintiff contended her husband suffered an injury arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act. Held: The conditions of employment aggravated the condition of the deceased and accelerated his death. Affirmed for plaintiff. *Lampkin v. Kent Piling Co.*, 34 So.2d 76 (La. 1948).

The instant case points out the tendency of the courts to construe the provisions of workmen's compensation acts in a liberal manner. This tendency is especially evident in cases where compensation was sought for injuries arising out of accidents coupled with pre-existing physical defects of the party injured.[1]

The modern decisions seem to allow compensation even in cases where the injury was caused by ordinary and usual exertion in conjunction with a pre-existing disease or physical defects.[2] However, some of the older cases seem to be in confusion.

Employers take workmen as they are without a warranty as to any previous state of health.[3] Hence, paralysis due in part to a blow on the head and in part to syphilis is compensable.[4] If strain causes a broken wrist, nobody questions the accidental nature of the injury, and if an artery breaks due to a pre-existing condition, it is just as clearly an accident.[5] An accident may arise out of and in the course of employment even under usual and ordinary conditions where the workman has some predisposing weakness.[6]

A small minority of courts say that the compensation statutes are in derogation of the common law and must be strictly construed.[7] These courts have held that a man who dies while doing certain lifting in the usual course of employment due to the co-existing fact that he suffered from rupture[8] or chronic heart disease[9] can show no evidence of mischance or miscalculation in what was being done.

The enactment of a Workmen's Compensation Law at the 1948 session of the Mississippi Legislature[10] will undoubtedly stimulate the interest of Mississippi lawyers in such questions as is typified by that in the instant case. Although there are no Mississippi cases on this point, by analogy to certain insurance cases some insight into the attitude to be taken by the Mississippi courts may be obtained.

In *U. S. Fidelity & Guaranty Co. v. Hood*,[11] the insured suffered an accident

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[1]Crowley v. City of Lowell, 223 Mass. 288, 111 N.E. 786 (1916); Brown v. Otto Nelson Co., 123 Me. 424, 123 A. 421 (1924); Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912 (1921); Giguere v. Whiting Co., 107 Vt. 151, 177 A. 313 (1935).

[2]Horovitz, Injury and Death Under Workmen's Compensation Laws 83 (1944).

[3]Geiguere v. Whiting, *supra* note 1.

[4]Crowley v. City of Lowell, *supra* note 1.

[5]Brown v. Otto Nelson Co., *supra* note 1.

[6]Patrick v. J. B. Ham Co., *supra* note 1.

[7]Stambaugh v. Peerless Wire Fence Co., 198 Mich. 445, 164 N.W. 537 (1917).

[8]Sinkiewicz v. Lee & Cady, 254 Mich. 218, 236 N.W. 784 (1931).

[9]Stambaugh v. Peerless Wire Fence Co., *supra* note 7.

[10]Miss. Laws 1948, c. 354.

[11]U. S. Fidelity & Guaranty Co. v. Hood, 124 Miss. 548, 87 So. 115 (1921).

which might have set in motion a latent and inactive heart disease, and death resulted from the accident accompanied by the effects of the disease. The policy insured against death resulting directly and exclusively of all other causes from bodily injury sustained through accidental means. The Mississippi Supreme Court held that in order to bring the disease within the exclusion of the policy it must proximately contribute to the death and found that it had not so contributed in this case.

In a later Mississippi case[12] the insured suffered a fatal accident which might have activated a latent diabetic condition. The policy insured against death resulting directly and exclusively of all other causes from bodily injuries sustained wholly through accidental means. The Mississippi Supreme Court followed the decision laid down in the *Hood* case.

The holding of the court in these Mississippi cases involving insurance coverage was liberal almost to the point of disregarding the express language of the policy. One might say with a degree of confidence that the Court will interpret cases arising under the Workmen's Compensation Act with equal liberality.

Charles B. Henley

Workmen's Compensation—Arising Out of and in the Course of Employment—Accidental Shooting of Nightwatchman by Child Not Material Departure

Widow sought workmen's compensation award for death of husband, who was nightwatchman. Deceased was fond of employer's son, and, while in the act of giving the boy a holster for his toy pistol during employment hours, he laid gun on table and child accidentally killed him. Held: Death arose out of and in the course of deceased's employment, and act was not departure from it. *Southern Cotton Oil Co. v. Bruce,* 32 So.2d 666 (Ala. 1947).

Compensation acts are founded on the cardinal principle that the risk of injury and the financial burden resulting therefrom should be borne by industry as a whole rather than fall solely upon the employee involved.[1]

The predominant inquiry of the courts in such controversies is whether the alleged act of the afflicted party arose out and in the course of his employment. The phrase "arising out of employment" refers to employment as the cause and source of the injury.[2] An injury arises in the course of the employment when it takes place: (1) within the period of the employment; (2) at a place where the employee may reasonably be; (3) while he is reasonably fulfilling the duties of the employment or while doing something incidental to it; (4) and results from a risk involved in the employment or incidental to it or to the conditions under which it is performed.[3] But on the other hand, to come within this rule, such conduct must not be impelled

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[12]Metropolitan Life Insurance Co. v. Williams, 180 Miss. 894, 178 So. 477 (1938).

[1]Southern Calif. Edison Co. v. Industrial Accident Commission, 78 Cal. App. 584, 248 P. 938 (1926); Corral v. Ocean Acc. Co., 42 Ariz. 213, 23 P.2d 934 (1933).

[2]Southern Cotton Oil Co. v. Bruce, 32 So.2d 666 (Ala. 1947).

[3]Stakonis v. United Adv. Co., 110 Conn. 384, 148 A. 334 (1930); Maddox v. Travelers Ins. Co., 39 Ga. App. 690, 148 S.E. 307 (1929); Logue v. Indep. School Dist., 53 Idaho 44, 21 P.2d 534 (1933); Keyhea v. Woodward Walker Lbr. Co., 147 So. 830 (La. App. 1933).

by motives which are wholly personal to the employee, and should be in furtherance of the business of his employer.[4]

The crucial question that emerges in the instant case, as indicated by the vigorous dissent, is whether deceased's act of proceeding to obtain the holster and placing the toy pistol in it constituted a complete departure from the service of the employer in order to perform a voluntary service for the accommodation of another. The majority opinion concluded that the deceased had not departed from his duties as a nightwatchman "to such an extent as to deprive his widow from the benefits of the Workmen's Compensation Law," because, "He had a right to retrieve the holster [which was owned by nightwatchman] and in doing so such act was also incidental to his employment. The fact that he wished to present the holster to the little boy rather than to keep it or return it to his house is of no importance." The dissent thought that "when Bruce proceeded to obtain the holster and place the toy pistol therein for his boy friend it was purely a matter of accommodation to the boy as well as for his own gratification."

The principal difference in the rationale of these two opinions seems to be that the majority places emphasis on the physical acts of the deceased in determining whether the act is incidental to his employment; while the dissent would stress the motive and intent of the employee and his personal reasons for the acts of the nightwatchman.

In the last analysis each case must be determined on its own facts and circumstances, and other cases are helpful only to the extent that the facts there dealt with are similar to those of the case under consideration.[5]

At first blush, the instant case may seem extreme in the result reached, but considering the purpose and legislative policy for which the Workmen's Compensation Act was established, and applying a liberal construction of the Act, the decision seems to be in accord with analogous modern decisions.

W. F. Riley

Workmen's Compensation—Casual Employee Not Permitted Compensation

Owner of leased building hired plaintiff to make repairs. Employment was only for such time as it took to complete the work, and was not connected with employer's

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[4]Republic Iron Co. v. Self, 192 Ala. 403, 68 So. 328 (1915); Rochester-Hall Drug Co. v. Bowden, 213 Ala. 242, 118 So. 674 (1928).

[5]Southern Cotton Oil Co. v. Bruce, *supra* note 2. Somewhat analogous situations in which compensation was allowed: Deceased was checking lumber being loaded on a boat when accidentally shot by one of the crew while cleaning his gun. *Ex parte* Rosengrant, 213 Ala. 202, 104 So. 409 (1925). Employee while in the act of climbing into employer's truck was accidentally shot and killed by a boy across the street shooting at a sparrow. Boris Construction Co. v. Haywood, 214 Ala. 162, 106 So. 799 (1925). Game warden shot by a second game warden while in the woods for the enforcement of game laws and concurrently hunting for their own benefit. Johnson v. Industrial Commission, 222 Wis. 19, 267 N.W. 287 (1936). *Contra:* While A was leaving his employer's premises, he was shot at by B, not an employee, who accidentally killed employee C. Dallas Mfg. Co. v. Kennemer, 243 Ala. 42, 8 So.2d 519 (1942). Employee, while calling for wife and incidentally performing job for employer, was killed in collision on highway. Marks Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181 (1929).

regular business. Building was only piece of real estate which employer rented to others. Utah Statute excluded those whose employment is casual and not in the usual course of employee's business.[1] HELD: Plaintiff was not entitled to workmen's compensation benefits because he was only a "casual employee." *Somerville v. Industrial Commission,* 196 P.2d 718 (Utah 1948).

Out of the fifty-four United States jurisdictions which have a workmen's compensation law, only ten fail to exclude the casual employee.[2] The exclusion clause in these acts is usually coupled with another clause excluding him who is not employed in the usual course of his employer's business. In most cases, the two clauses are joined by "and", making both elements necessary for exclusion.[3] In the rest, only one element is present, or the two are joined by "or", making either element sufficient for exclusion.[4] In any case, the two terms are closely related, and should be discussed together.

Courts have found it difficult to effectively isolate "casual employment" within hard and fast bounds. It is a relative term, not capable of concrete definition.[5]

Some of the statutes themselves provide a test for the application of the term, and in those states, it has caused relatively little difficulty.[6] In most others, casual employment is defined as employment which is occasional, incidental, happening at uncertain times, not stated or regular.[7]

Such a definition still leaves the courts with a great deal to do in applying the term to a particular set of facts. By the weight of authority, it is the nature of the employment which governs, its frequency or duration being immaterial.[8] There is, however, some authority for imputing the casualness to the contract of hire, thus requiring the employment to arise incidentally, or haphazardly[9], as in the case of employment to shovel snow after a storm.[10] It seems to be generally conceded that if the work is recurrent at periodic intervals, it is not casual.[11] It has also been

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[1]UTAH CODE ANN. § 42-1(2) (1943).

[2]2 SCHNEIDER, WORKMEN'S COMPENSATION 100 (3d ed. 1942). These jurisdictions are Alaska, Kansas, Kentucky, Louisiana, Michigan, Mississippi, New York, Oklahoma, Oregon, and Washington. However, the Kansas Act applies only to employments "in the course of the employer's trade or business." GEN. STAT. OF KAN. § 44.505 (1935).

[3]*Id.* at 98. These states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Indiana, Iowa, Minnesota, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont and Wyoming.

[4]*Id.* at 99-100.

[5]Rabideau v. Cramer, 59 Idaho 154, 81 P.2d 403 (1938); Cochrane v. William Penn Hotel, 339 Pa. 549, 16 A.2d 43, 44 (1940).

[6]2 SCHNEIDER, *op. cit. supra* note 2 at 100. These states are California, Florida, Missouri, Montana, Nebraska, Nevada, New Jersey, and Tennessee.

[7]Tokash v. General Banking Co., 349 Mo. 767, 163 S.W.2d 554 (1942); March v. Bernadin, 229 Mo. A. 246, 75 S.W.2d 706 (1934); Vercin v. Pennsylvania Electric Co., 336 Pa. 502, 9 A.2d 546 (1939); Ward v. Ocean Forest Club, 185 S.C. 233, 198 S.E. 385 (1938).

[8]Johnson v. Ashville Hosiery Co., 199 S.C. 38, 153 S.E. 591 (1930); State *ex rel* Bettman v. Christen, 128 Ohio 56, 190 N.E. 233 (1934); Berry v. Atlantic Greyhound Lines, 30 F.Supp. 188 (1939); Parks v. Carmell Co., 168 Tenn. 385, 79 S.W.2d 285 (1935).

[9]Tournenn v. Consolidated Fishery Co., 51 A.2d 862 (Del. 1947).

[10]Lockhart v. Stemer, 119 N.J. Law 342, 196 A. 666 (1938).

[11]McCabe v. Shannon & Son, 147 Pa. Super. 491, 24 A.2d 16 (1942).

held not casual if the employee is hired to do all of that particular type of work, however infrequently or irregularly the need for such work arises.[12]

The trend of the courts in defining the term "casual", and applying it to the pertinent set of facts is to make the term as inclusive as possible, and to construe it liberally for the employee and strictly against the employer.[13] An employee is seldom excluded in modern day practice merely because he is casual.

The exclusion of the casual employee is a hangover from the British Act, a model for earlier American acts. The British Act excluded employment "of a casual nature."[14] This Act, when enacted, was an experiment. It was designed primarily to insure the worker who labored in large industries, and who was one of a large number of employees.[15] The drawers of the British Statute were faced with the problem of how to unequivocally insure this worker, and yet not work a hardship on the small independent businessman. In seeking to balance the two interests and to be fair to both, they limited the Act by many exclusions and conditions which exemplified the caution necessary to an experiment of such magnitude. The exclusion of employments casual in nature was designed to protect the small businessman or the occasional employer from claims from those whom they engaged on the spot to run errands or do odd jobs, as the occasion for such jobs arose. It was not intended to protect this sort of worker.[16]

Experience and the changing aspects of industry and small business necessitated the removal of some of these restrictions, and the insertion of others in later legislation. The exclusion of the casual employee, however, remained unchanged in the earlier United States acts, and this exclusion has continued until today it is a part of the vast majority of American statutes.[17]

However, the trend of the courts has been away from excluding an employee merely because he is casual. It has been found that, in cases where the casual employee is involved and where allowing his claim would work an undesigned hardship, he is excluded by other restrictions. The more modern compensation statutes do not exclude the casual employee as such. The Mississippi Act[18] is one of these.

William Moroney.

Workmen's Compensation—Change of Physicians After Medical Treatment Begun

Injured employee requested a change of physicians from his employer, who referred him to the Industrial Commission. He then requested such a change from the Commission, which, through its attorney, arranged informally for the necessary treatment at reasonable expense, and employee obtained services from the designated

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[12]Coffin v. Hook, 111 Ind. App. 549, 45 N.E.2d 369 (1942).

[13]Gardner v. Trustees of Main St. Methodist Church, 217 Iowa 1390, 250 N.W. 740 (1933).

[14]Hill v. Begg, 2 K.B. 802.

[15]Reede, Adequacy of Workmen's Compensation Introduction (1947).

[16]*Id. See* Stapleton v. Industrial Commission, 24 Wis. 133, 26 N.W.2d 677 (1946).

[17]Reede, *op. cit. supra* note 15 at 8.

[18]Miss. Laws 1948, c. 354.

doctor. The Commission made no formal written order. The statute[1] provided that the employer must furnish medical treatment, and that, in case of the employer's inability or refusal seasonably to do so, he shall be liable for the reasonable expense incurred by or on behalf of the employee in providing it. It further provided that, upon request by the employee, the Commission may order a change of physicians and designate a physician suggested by the injured employee or by the Commission itself, in which case the employer is to bear the expense. Employee sued for compensation for this medical expense. HELD: It was compensable within the meaning of the statute, although no written order authorizing the change was made by the Commission. *O'Neil v. Oliver Iron Mining Co.*, 32 N.W.2d 71 (Minn. 1948).

The fact that employee received medical treatment without formal written order being entered was not a bar to relief. The court relied for this proposition on *Morrell v. City of Austin.*[2] There it was held that the failure of employer to provide competent medical treatment, after request by employee, amounted to a refusal to furnish such treatment as was reasonably required, although employer was furnishing medical treatment of a sort. Hence the employee was allowed expenses incurred by him at the Mayo Clinic, although no order for a change of physicians had been issued by the Commission.

Where medical service provided by the employer is inadequate or inefficient an employee would seem to be justified in changing to a physician of his own choice, for the expense of which he should be allowed compensation.[3] One test of his right to seek private treatment at the expense of the employer seems to exist where the employee's physician effects a benefit or cure, and previously employer's physician had failed. This would establish the inadequacy of the service tendered by employer.[4] In order to avoid liability for expenses incurred by or on behalf of employee upon changing physicians, the employer must have tendered services of like character to those which employee obtained.[5] However, this does not connote a privilege in employee of dictating to employer what agencies shall be employed to render the necessary service;[6]

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[1]"The employer shall furnish such medical, surgical and hospital treatment, including nursing, medicine, medical and surgical supplies, crutches and apparatus, including artificial members, as may reasonably be required at the time of the injury and during the disability to cure and relieve from the effects of the injury; provided that, in case of his inability or refusal seasonably to do so, the employer shall be liable for the reasonable expense incurred by or on behalf of the employee in providing the same; provided further, that, upon request by the employee, the Industrial Commission may require the above treatment, articles and supplies for such further time as the Industrial Commission may determine, and a copy of such order shall be forthwith mailed to the parties in interest. Any party in interest, within ten days from the date of mailing, may demand a hearing and review of such order.

"The Commission may, at any time, upon the request of an employee or employer, order a change of physicians suggested by the injured employee or by the Commission itself, and in such case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance." M.S.A. § 176. 15 [MASON'S MINN. STAT. § 4279 (1927)].

[2]208 Minn. 132, 293 N.W. 144 (1940).

[3]Note 142 A.L.R. 1205, 1227 (1940).

[4]*See* Union Iron Works v. Industrial Accident Commission, 190 Cal. 33, 210 P. 410 (1922); Los Angeles County v. Industrial Accident Commission, 13 Cal. App.2d 69, 56 P.2d 577 (1936).

[5]*See* Old Ben Coal Co. v. Industrial Commission, 311 Ill. 35, 142 N.E. 507 (1924).

[6]*See* Cavannaugh v. Snyder and Robbins, 4 N.J. Misc.R. 801 (1926).

nor does it indicate that employer's physician must be infallible. The dividing line is difficult to draw, and the determination is that of the Commission. The employer's obligation is certainly not fulfilled by furnishing inadequate professional service.[7] Reasonable medical treatment requires the ". . . exercise of ordinary care and skill in light of present day learning and enlightenment on the subject . . ."[8] and includes the use of modern methods of diagnosis and treatment.[9]

Many workmen's compensation statutes provide in effect that the employee shall receive at employer's expense such treatment as may be reasonably required to cure or relieve him from the effects of the injury. Medical benefits are sometimes limited in time and in amount.[10] At least nineteen states provide that the employer shall be liable for cost of medical service if he refuses or fails to provide it and the injured employee obtains it.[11] Fourteen states authorize the agency to order a change of physicians under certain circumstances.[12] However, consideration of the principal case, of *Morrell v. City of Austin*, and of their predecessors indicates that the same conclusions would have been reached, even in the absence of an express authorization to the agency to change physicians. They seem to be based upon the "refusal to furnish reasonable medical treatment" provision, rather than on the express authorization to the commission to order a change of physicians.

Mississippi's recently enacted Workmen's Compensation Law[13] does not expressly grant this power to the Commission. It merely states that, if the employer fails and refuses to provide such medical treatment "as the nature of the injury or the process of recovery may require", the "injured employee may do so at the expense of the employer."[14] Nevertheless, considering the Mississippi statute as a whole, it would seem that the Commission could exercise the same power, although not expressly authorized to do so.[15] Moreover, since the courts construe a "refusal to furnish reasonable medical treatment" not only to mean such a refusal in the first instance, but also

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[7]*See* Shank v. Consolidated Coal Co., 161 Pa.Super. 304, 54 A.2d 289 (1947).

[8]Johnson v. A. C. White Lumber Co., 37 Idaho 617, 217 P. 979 (1923).

[9]*Ibid.*

[10]See SCHNEIDER, WORKMEN'S COMPENSATION STATUTES. (Permanent Ed. 1939).

[11]Ark., Cal., Conn., Del., Fla., Idaho., Ind., Kan., Ky., Me., Minn., Miss., N. J., Okla., Pa., S. C., Tenn., Tex., Wis. In Conn., Del., Fla., Miss., N. J., Pa., Tenn., and Tex. employer is liable only after request by employee.

[12]Ariz., Ark., Col., Conn., Fla., Ga., Kan., Minn., Mont., Nev., N. C., Okla., S. C., Va. In R. I., N. C., Mass., and Ohio (as to state insurance fund cases only) employee is permitted to select, in the first instance, the physician at employer's expense. In N. Y. and Wis. selection is permitted by employee from a panel selected, in the former state, by the commission and, in the latter, by employer. For an interesting insight into the difficulties encountered in N. Y. under that state's earlier statute, which was almost word for word identical with that now enacted in Miss., see DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 409-419 (1936).

[13]"The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury may require. If the employer fails to provide the same, after requst by the injured employee, such injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same. . ." Miss. Laws 1948, c. 354, § 7(a).

[14]*Ibid.*

[15]*Id.* § § 18, 37(d).

after the employer has actually furnished inadequate or incompetent treatment, it is not unreasonable to predict that Mississippi will follow the construction applied to analogous statutes and allow a change of physicians or treatment under similar circumstances. Wherever possible, however, the employee should eliminate the factual issue by first obtaining a Commission order authorizing the change.

W. Byron Long

Workmen's Compensation—Death Benefits—Total and Partial Dependency

Claimant's son was killed instantly in the course of his employment. He had been contributing about $70 per month toward her support, her living expenses being about $155 per month. She quit a "steady part time" job the day of his death.[1] She brought her claim under the California Workmen's Compensation Law[2] as a *total* dependent. The Commission found her to be only *partially* dependent and based its award thereon. The Commission now appeals from a lower court finding[3] of total dependency. Held: The question of dependency is one of fact for determination by the Commission. "Only where there is no evidence of substance to support its determination may the award based thereon be annulled. . . . The evidence supports the Commission's finding . . . of partial dependency of the applicant." *Coborn v. Industrial Accident Commission,* 192 P.2d 959 (Cal. 1948).

The determination of who is a dependent lends itself to analysis upon two bases: First, what classes of persons are embraced by the term "dependent", that is, what personal relationship must they bear to the deceased; second, what degree of dependency must the claimants have upon the deceased, that is, what economic relationship must they bear to him?

Dependency is everywhere a question of fact. "In nearly half of the state acts in this country and in the federal acts, finality is given to findings of the commission on facts."[4] A few jurisdictions allow an appeal of jurisdictional questions and sometimes a complete trial *de novo*.[5] The Mississippi Workmen's Com-

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[1]She testified that the job was temporary and that she had intended quitting within the month of his death, the purpose of the job being to accumulate sufficient cash to buy bedding and other articles needed during convalescence from a contemplated operation which, she stated, deceased had intended to finance. She further testified that she had been in bad health, and that this fact was known by deceased, who had objected to her working and had expressed an intention to provide her entire support.

[2]"The death benefit shall be a sum equal:

(a) In a case of total dependency, three times the average annual earnings of the deceased employee.

(b) In a case of partial dependency only, three times the amount annually devoted to support of the dependents by the employee. . . . In no case shall the death benefit . . . exceed . . . [maximum amounts depending upon different stated conditions]." Calif. Labor Code § 4702 (1937).

[3]Coborn v. Industrial Accident Commission, 193 P.2d 691 (Cal. App. 1947).

[4]Bond, C. J. in Thomas v. Pennsylvania R. Co., 162 Md. 509, 514, 160 A. 793, 795 (1932).

[5]Horovitz, Workmen's Compensation 291 (4th ed. 1944) listing the states of Florida, Nebraska, North Dakota, Ohio, Oregon, Rhode Island, Texas, and Washington.

pensation Law[6] indicates a judicial review of the facts as presented by the record only, but is ambiguous as to whether the substantial evidence rule will be applied.

Under many statutes the fact of total dependency is conclusively presumed once the claimant has established the fact that he bears the requisite personal relationship to the deceased.[7] The Mississippi statutory "presumption"[8] is not conclusive. There are no statutory presumptions of partial dependency.

When there are no conclusive presumptions to aid them, courts have indulged in broad definitions of "dependency".[9] In considering these general expressions it should be borne in mind that nearly all workmen's compensation statutes draw some distinctions between parties "totally" or "wholly" dependent upon the injured workman, and those "partially" dependent or merely "dependent" upon him.[10] In Arkansas and Florida these distinctions have been reached indirectly through the means of statutory definitions[11] of different classes of relationships, which include in some classes[12] only claimants "wholly dependent", and include in other classes[13] only claimants "dependent" on the deceased. The courts of these two states have followed through with these distinctions,[14] and it is likely

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[6]"The final award of the Commission shall be conclusive and binding unless either party to the controversy shall . . . appeal therefrom to the circuit court of the county in which the injury occurred.

". . . whereupon the Commission shall . . . transmit to the court all documents and papers on file in the matter, together with a transcript of the evidence, the findings and award, which shall thereupon become the record of the cause. Appeals shall be considered only upon the record as made before the Commission. . . . The circuit court shall review all questions of law and of fact. . . . Appeals may be taken from the circuit court to the Supreme Court in the manner as now required by law." Miss. Laws 1948, c. 354, § 20.

[7]Usually benefited are widows, children under the age of eighteen, and children over the age of eighteen who are physically or mentally incapacitated. CALIF. LABOR CODE, § 3501 (1937); ALA. CODE, § 280 (1940); La. Workmen's Compensation Law, § 17 (1944 amend.). See note 21 *post.*

[8]"It is expressly provided, agreed, and understood in determining beneficiaries under this section that a widow, widower and children under the age of eighteen years are presumed to be dependent, and it shall be the duty of the employer or his insurer by a preponderance of evidence to remove said presumption of dependence." Miss. Laws 1948, c. 354, § 2(18). It would seem that this section is more in the nature of a statement of the party upon whom the *burden of proof* rests rather than a presumption in the usual sense of shifting the burden of going forward with the evidence. WIGMORE, EVIDENCE § § 2485, 2487 (3d ed. 1940).

[9]"The word 'dependency' implies a present existing relation between two persons where one is sustained by another or looks to or relies on the aid of another for support or for reasonable necessaries consistent with the dependent's position in life." Peterson v. Industrial Commission, 331 Ill. 254, 162 N.E. 846 (1928).

[10]ALA. CODE, § 283 (1940); CALIF. LABOR CODE, § 4702 (1937); COLO. STAT. ANN., c. 97, § § 52-57 (1935).

[11]Ark. Workmen's Compensation Law, § § 2(j)-2(m) (1948); Fla. Workmen's Compensation Law, § 2(12)-2(15) (1941).

[12]Married children under the age of eighteen, and married brothers and sisters under the age of eighteen.

[13]Children, parents, widows, and widowers.

[14]H. N. Rodgers & Sons v. Nelson, 209 Ark. 866, 192 S.W.2d 972 (1946); Arthur Murray Co. v. Cole, 209 Ark. 61, 189 S.W.2d 614 (1945); Cross v. Sumter County, 152 Fla. 864, 13 So.2d 219 (1943); Moorer v. Putnam Lumber Co., 152 Fla. 520, 12 So.2d 350 (1943).

that Mississippi, whose statutory definitions of classes of dependents[15] are almost identical, will do the same. If the decisions of these two states are followed, and in view of the manner of computation of the size of the award to be granted under the Mississippi Law,[16] it would seem that the result of a finding of partial dependency of certain classes of claimants[17] would result in a denial of any award rather than a reduction in the size of an award granted as in the principal case.

No sharp line can be drawn between total and partial dependency or between partial dependency and no dependency. It has been said that the test of total dependency "is whether such person had to look to the amount contributed for her entire support,"[18] but absolute destitution is not required.[19] Partial dependency has been defined as reliance "partly upon contributions of a person whose aid constitutes a material element in the claimant's support,"[20] but this reliance need not be the result of claimant's physical or mental disability[21] except under some statutes.[22] The aid must be "actual and substantial" and with "a reasonable expectation that it will be made in the future."[23]

It is submitted that the Mississippi Workmen's Compensation Law should be amended to allow awards based on partial dependency (as in the principal case) to those parties now apparently denied any recovery unless totally dependent.

Nathan Levy, Jr.

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[15]Miss. Laws 1948, c. 354, § § 2(12)-2(15). The Mississippi law similarly defines those parties defined in the Arkansas and Florida statutes, *supra* notes 11, 12, and 13, and in addition, includes as children, grandchildren, brothers, and sisters, those claimants eighteen years of age or over who are "wholly dependent upon the deceased employee and incapable of self-support by reason of mental or physical disability."

[16]Miss. Laws 1948, c. 354, § 9, which sets forth the manner of computation of death benefits, does not distinguish between total and partial dependents. Under this section all classes of persons not presumed dependent by § 2(18), *supra* note 8, are required to be "dependent".

[17]Married children under eighteen years of age, married brothers and sisters under the age of eighteen, and children, grandchildren, brothers, and sisters eighteen years of age or over, who are incapable of self-support by reason of mental or physical disability. Miss. Laws 1948, c. 354, § 2(12).

[18]Sandlick Coal Co. v. Day, 233 Ky. 632, 26 S.W.2d 521 (1930).

[19]Thus, total dependency has not been defeated because the claimant did the family cooking, washing and ironing, Sandlick Coal Co. v. Day, *supra* note 18; or had a small income from occasional barbering and from rental property, Obear-Nester Glass Co. v. Industrial Commission, 398 Ill. 342, 75 N.E.2d 892 (1947); or earned small sums at uncertain and irregular employment during a few summer months, Peterson v. Industrial Accident Commission, 188 Cal. 15, 204 P. 390 (1922); or received gratuitous services from others, Bloomington-Bedford Stone Co. v. Phillips, 65 Ind. App. 189, 116 N.E. 850 (1917).

[20]Arthur Murray Co. v. Cole, *supra* note 14; H. N. Rodgers & Sons v. Nelson, *supra* note 14. *But see* Hendricks v. Bethlehem Steel Co., 150 Pa. Super. 257, 27 A.2d 264 (1942); Comment, 17 TEMPLE L.Q. 109 (1943), where an award was refused a widow because the contributions from her legally separated husband were paid to her for the sole support of their minor child who was in her custody, even though she needed and used part of the money for her own support.

[21]Aetna Casualty & Surety Co. v. Johnson, 70 Ga. App. 698, 29 S.E.2d 318 (1944), where claimant was healthy and working part time and had a working husband. This case also held that the statutory conclusive presumption of the total dependency of a wife upon her husband did not apply to defeat the wife's claim based upon partial dependency upon her deceased son, even though the husband was still living.

[22]*Supra* note 7.

[23]Cross v. Sumter County, *supra* note 14.

Workmen's Compensation—Determination of Time When Right to Temporary Disability Payments Ceases

Plaintiff's injuries were such that it was necessary to amputate his right arm. The arm did not heal in a normal manner, and a second amputation was necessary, with the result that final recovery was delayed for approximately eighteen months. Plaintiff claimed "temporary total disability" payments under the Nebraska Workmen's Compensation Act to the time of the final healing of the arm after the second amputation. Held: The clause, "compensation for temporary disability shall cease as soon as the extent of the permanent disability is ascertained," in the Workmen's Compensation Act meant that temporary disability shall end when the condition becomes fixed and the employee is restored so far as the permanent character of his injuries permits, which would be to the time of the final healing after the second amputation. *Allen v. Department of Roads and Irrigation of State,* 32 N.W.2d 740 (Neb. 1948).

About half of the states allow temporary disability payments in addition to the permanent disability payments.[1] Most of the courts interpreting similar statutory provisions follow the principal case in using such general terms to point out when temporary disability payments end. The courts generally determine the problem as to when these payments end in such general terms as the following:

1. Temporary disability payments end when nothing further must be done to improve or heal the member or injury.[2]
2. Temporary disability payments shall continue throughout the healing period.[3]
3. Temporary disability payments shall end when the complete and permanent loss or loss of use occurs, that is, when no reasonable prognosis for complete or partial cure nor further improvement can be reasonably expected.[4]
4. Temporary disability payments shall continue until the injured employee is as far restored as the permanent character of the injuries permits.[5]

It is apparent that the question as to when the temporary payments cease is, in most cases, a question of fact to be determined from the evidence presented to the commission or to the body designated by the compensation act to determine questions of fact. Medical testimony will determine ordinarily the compensation commission's ruling as to what disability exists and this in turn controls the compensation award. Since medical evidence will indicate when temporary payments should cease, it is of the utmost importance that such evidence be competent and accurate. The testimony of physicians employed in compensation cases has been found to frequently coincide with the interests of the parties who employed them. The divergence in judgment, it

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[1]Dodd, Administration of Workmen's Compensation 629, 630 (1936); Reede, Adequacy of Workmen's Compensation 116, 117 (1947).

[2]Hamilton and Hartman v. Badgett, 164 Okl. 31, 22 P.2d 350 (1933); Panico v. Sperry Engineering Co., 113 Conn. 707, 156 A. 802 (1931).

[3]Briscoe Construction Co. v. Listerman, 163 Okl. 17, 20 P.2d 560 (1933); Magnolia Petroleum Co. v. Allred, 160 Okl. 115, 16 P.2d 78 (1932).

[4]Franko v. Schollhorn Co., 93 Conn. 13, 104 A. 485 (1918); Knobbe v. Davis, 208 Wis. 185, 242 N.W. 501 (1932); Wrenn v. Connecticut Brass Co., 96 Conn. 35, 112 A. 638 (1921).

[5]Jackson v. Bethlehem-Fairfield Shipyard, Inc., 185 Md. 335, 44 A.2d 811 (1945); Vishney v. Empire Steel and Iron Co., 87 N. J. Law 481, 95 A. 143 (1915).

is said, between carriers' and employees' doctors could not be the reflection of an honest difference in opinion.[6]

Under the Compensation Act of Mississippi temporary total disability payments are allowed "during the continuance of such disability"[7] and the permanent partial disability payments "shall be paid following compensation for temporary total disability".[8] The adjudication of the claims for compensation "shall be determined by the rules of the Commission"[9] with court review of all questions of law and fact allowed.[10] The Commission shall have the power to select its own physician to examine an employee when in its opinion a physician has not correctly estimated the degree of disability[11] and shall appoint one or more medical officers as are necessary to adequately administer the Workmen's Compensation Law.[12] The injured worker shall have the privilege of a medical examination by a physician if he believes that his interest has been prejudiced by the physician designated by the employer or carrier and the charge shall be paid by the employer or carrier where the previous medical findings have been upset by the physician chosen by the employee.[13]

It is hoped that the Compensation Commission will promulgate rules to assure impartial medical testimony. This should include the use of an adequate medical staff employed by the Commission. In this manner, a fair and accurate determination can be made as to when temporary disability benefits should cease, and as to other medical facts relevant to the employee's injuries.

Albert Jordan, Jr.

Workmen's Compensation—Effect of Refusal to Undergo Second Operation for Same Hernia

Employee developed hernia in the course of his employment, and submitted to an operation which was unsuccessful. He refused to undergo a second operation which the employer offered to pay for. Physicians testified that it would not be unduly dangerous, and recommended that it be performed. The Kentucky Statute, relating specifically to hernia,[1] provides that a workman submitting to the necessary operation shall

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[6]The Medical Treatment of Compensation Cases, p. 95, submitted to the Governor of New York in 1932, by the Committee to Review Medical and Hospital Problems in Connection with Workmen's Compensation Insurance. See copy of this report in Dodd, *op. cit. supra* note 1, at pp. 445-469.

[7]Miss. Laws 1948, c. 354, § 8(b).

[8]*Id.* § 8(c).

[9]*Id.* § § 13, 18, 37.

[10]*Id.* § 20.

[11]*Id.* § 7(b).

[12]*Id.* § 41.

[13]*Id.* § 7(e).

[1]Ky. Rev. Stat. § 342.025(3), provides for surgical correction of the hernia, by radical operation; and for a medical examination in the event of a refusal to submit to the operation. The section further provides in part: "If the examination does not disclose the existence of disease or other physical condition rendering the operation more than ordinarily unsafe, and the employee, with the knowledge of the result of such examination, thereafter refuses to submit to such operation, he shall be entitled to compensation for disability under the general provisions of this chapter for not exceeding one year. If the employee submits to the operation, he shall, in addition to the surgical benefits herein provided for, be entitled to compensation for his actual disability following such operation."

be entitled to compensation for the actual period of disability following such operation. A general provision of the act[2] states that no compensation will be paid for an injury that is aggravated, caused, or continued by an unreasonable failure to submit to competent surgical treatment. HELD: The provisions of the statute dealing specifically with hernia are exclusive, and that only one operation is contemplated by the statute. Workman awarded 75% partial permanent disability. *City of Olive Hill v. Parsons*, 306 Ky. 83, 206 S.W.2d 41 (1947).

Some states, such as New York and Louisiana, have neither statutory provisions for a denial of compensation, in the event of an unreasonable refusal to submit to treatment, nor specific provisions dealing with hernia. In a Louisiana case,[3] wherein the second operation was recommended by medical witnesses, the court held that the employee was reasonable in refusing to submit to further operations. The court said that a refusal by a person in ordinary health to undergo one operation might be unreasonable, but that where there had been one unsuccessful operation, a refusal to undergo another could not be considered as such.

One case,[4] involving facts similar to those in the principal case, has been decided by the Texas Court. In that case the employee refused to undergo a second hernia operation, which was recommended as safe and beneficial by a state appointed medical board. The court held that the statute[5] provided for only one operation, and that when that one had been performed, the act required nothing further from the injured employee. The court expressed their opinion as being that the intent of the act was not to require an injured workman to submit to surgical experimentation.

The Oklahoma Court, in interpreting the Oklahoma Statute[6] three times,[7] has consistently held that: "An injured workman who is permanently and totally disabled by reason of a recurring hernia, and who has undergone one unsuccessful operation, is not required to subject himself to another operation which would be dangerous and probably useless, in order to minimize the financial burden imposed by law on his

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[2]KY. REV. STAT. § 342.035(2).

[3]Crawford v. Tampa Inter-Ocean S. S. Co., 155 So. 409 (La. App. 1924); *accord*, Massotti v. Newburgh Shipyards, Inc., 210 App. Div. 538, 206 N. Y. Supp. 383 (3d Dept. 1924).

[4]Indemnity Insurance Co. v. Jones, 299 S.W. 674 (Tex. 1927).

[5]TEX. REV. CIV. STAT., tit. 130, art. 8306, § 12(b), provides in part: ". . . If the employee submits to the operation and the same is successful, which shall be determined by the board, he shall in addition to the surgical benefits herein provided for be entitled to compensation for twenty-six weeks from the date of the operation. If such operation is not successful and does not result in death, he shall be paid compensation under the general provisions of this law the same as if such operation had not been had; other than in determining the compensation to be paid the employee, the board may take into consideration any minor benefits that accrued to the employee by reason thereof, or any aggravation or increased injury that accrued to him by reason thereof."

[6]85 OKLA. ST. ANN. § 22, ST. 1931 § 13356(3), reads: "Hernia: In any case of any injury resulting in hernia, compensation for fourteen weeks, and the cost of the operation shall be payable; provided, that if the hernia results in a total permanent disability, then the commission may so determine said fact and award the claimant compensation for a total permanent disability."

[7]Pioneer Mills Co. v. Webster, 189 Okla. 433, 114 P.2d 914 (1914); Dierks Lumber & Coal Co. v. Lindley, 182 Okla. 185, 77 P.2d 44 (1938); United Service Street Car Co. v. McCarter, 167 Okla. 433, 30 P.2d 456 (1934).

employer, or his employer's insurance carrier."[8] In the first of the Oklahoma cases determinative of this question,[9] the court was concerned with maintaining the "reasonableness test," saying that the reasonableness of the refusal was a matter of fact in every case, but intimating that any refusal would be considered reasonable when there had been a previous operation. The two later cases,[10] however, have ignored this test, and simply hold that an employee is under no obligation to undergo a second hernia operation after the first has proved unsuccessful.

The West Virginia Court, in a recent case[11] decided under the hernia provisions of the West Virginia Workmen's Compensation Law,[12] held that a claimant could not be required to submit to a second hernia operation, as a condition precedent to an award based on his present physical condition. The court said that the statutory provisions, as to a hernia operation, were written in the singular, and that the terms of the statute had been complied with when the claimant submitted to one operation. The agency had no discretionary power to require two, three, or an indefinite number of radical operations.

The Mississippi Workmen's Compensation Law contains a general provision excluding workmen from receiving compensation upon an unreasonable failure, on their part, to submit to treatment,[13] and specific provisions dealing with hernia.[14] The latter are considerably more rigorous than those encountered in most of the workmen's compensation laws,[15] and would appear to limit unreasonably the compensation rights of the workman, when hernia is involved. The Mississippi Court

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[8]United Street Car Co. v. McCarter, 167 Okla. 433, 30 P.2d 456 (1934).

[9]*Ibid.*

[10]Pioneer Mills Co. v. Webster, 189 Okla. 223, 114 P.2d 914 (1941); Dierks Lumber & Coal Co. v. Lindley, 182 Okla. 185, 77 P.2d 44 (1938).

[11]Shrewsbury v. State Compensation Com'r., 32 S.E.2d 361 (W. Va. 1944).

[12]W. Va. Code, c. 23, art. 4, § 7 (1943), provides in part: "All hernia . . . shall be treated in a surgical manner by radical operation. . . . In non-fatal cases, time loss only shall be paid, unless it is shown by special examination that the injured employee has a permanent partial disability resulting after the operation. If so, compensation shall be paid in accordance with the provisions in section six of this article, with reference to permanent partial disability. In case the injured employee refuses to undergo the radical operation for the cure of said hernia, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that it is considered unsafe for him to undergo such operation, he shall be paid as provided in section six."

[13]Miss. Laws 1948, c. 354, § 7(a).

[14]Miss. Laws 1948, c. 354, § 8(f), reads in part: "In every case of hernia as above defined, it shall be the duty of the employer forthwith to provide the necessary and proper medical, surgical and hospital care and attention to effectuate a cure by radical operation of said hernia, not exceeding, however, the sum of two hundred fifty dollars ($250.00), and to pay compensation under the provisions of paragraph (b) of this section, not exceeding, however, a period of twenty-six (26) weeks.

"In case the employee shall refuse to permit *such operation,* (emphasis is the writer's) it shall be the duty of the employer to provide all necessary first aid, medical and hospital care and services, and to supply the proper and necessary truss or other mechanical appliance to enable said employee to resume work, not exceeding two hundred fifty dollars ($250.00), and shall further pay compensation under the provisions of paragraph (b) hereof not exceeding, however, the period of thirteen (13) weeks."

[15]Reede, Adequacy of Workmen's Compensation table 7 (1947). Ten states provide for a total, and two for a partial denial of compensation, in the event of an unreasonable refusal to submit to treatment. Twenty-nine states incorporate special provisions, as to hernia, in their workmen's compensation acts.

may well follow the attitude of the court in the instant case. It would seem that the reference in Section 8(f) to a refusal to permit "such operation" contemplates only one operation, and that the terms of the section have been met and exhausted by submitting to such operation. If the hernia continues, the claimant should be awarded compensation for his actual remaining disability.

Robert J. Hobby

Workmen's Compensation—Extension of Existing Contract as Incident to the Course of Employment

Employer was sole owner of a garage business where deceased was employed to do general work. Employer was also engaged in farming, which was conducted in his own name.[1] Employer sent deceased to his farm to clean out a well during regular working hours at the garage, and agreed to give him extra compensation for the job. Deceased was killed while cleaning out the well. In an application for benefits by deceased's widow, the insurer contended that the deceased was not killed while working within the course of his garage employment, and that therefore its policy did not cover this accident. Held: The additional task of cleaning out the well represented an agreed extension of the employment contract. *Utica Mutual Insurance Co. v. Winters,* 48 S.E.2d 918 (Ga. 1948).

In reaching its decision the court said that if a farmer were to engage in the cleaning of a well as an incident to farming, he would not cease to be a farmer, and if a garage employee is assigned to the task of cleaning a well on a farm owned by the employer, he does not lose his character of garage employee.

In a similar case,[2] the court went even further by holding compensative an injury sustained by a coal yard employee while temporarily assisting those working on his employer's farm without any additional compensation. The court said that the exception of agricultural employees related to a general contract of hiring only, and did not refer to other casual or incidental work performed at the request of the employer. It held that the injury was suffered under a valid extension of and in the course of employment.

These decisions are consistent with the trend of construing liberally the statutes in favor of recovery by the employee where he is partially detached from his employment because he is not performing his usual job, but where the act is done under orders from the employer,[3] or done without orders in furtherance of his employer's business.[4]

Temporary detachment from the usual course of employment for the benefit of the employer, employee, or both has long been recognized as an incident to the master-servant relationship already existing,[5] even if based upon an amended contract wherein

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[1]The Georgia Workmen's Compensation Act (Ga. Code Ann. § 114-107) exempted farm labor from the benefits of workmen's compensation. See also: Miss. Laws 1948, c. 354, § 3.

[2]Matis v. Schaeffer, 270 Pa. 141, 113 A. 64 (1921).

[3]Stockley v. School District, 231 Mich. 523, 204 N.W. 715 (1925); O'Rourke v. Percy Vittum Co., 166 Minn. 251, 207 N.W. 636 (1926).

[4]*Ex Parte* Terry, 211 Ala. 418, 100 So. 768 (1924).

[5]Stakonis v. United Adv. Co., 110 Conn. 384, 148 A. 334 (1930).

special or extra services are rendered as consideration for an increase in pay.[6] By thus amending or enlarging the existing contract of employment, the scope of employment is broadened and the course of employment is necessarily changed to conform with the requirements for performance of the specified task. As the court in the instant case pointed out:

> . . . the doing of such additional work with extra pay was an incident of the contract of employment with the motor company; for to hold otherwise might in some cases—where the work was distributed among several lines of work—create as many different kinds of work, and, with every new piece of work outside the particular work for which the employee was employed, a new contract would be formed.

As in the instant case, it is not unusual for the courts to allow considerable enlargement or extension of the "course of employment" in compensation cases,[7] in view of the "exclusiveness of liability" clauses,[8] and the legislative intention to extend benefits to legitimately related activities.

Elwyn Darden

Workmen's Compensation—Injuries Incurred During Recreational Activities as Arising Out of and in the Course of Employment

Claimant, who was employed by a dry goods company as a cashier, was injured in an automobile accident while on a trip to play basketball upon a team sponsored by the company as part of their public relations and advertising campaign. The team was controlled by the public relations officer of the company. The company furnished uniforms which the team wore and upon the backs of which appeared the word "Shamrocks", and they were known as the "Auerbachs Shamrocks". Claimant's expenses while on a trip to play basketball were paid by the company. Any income from the games went to the company. In a proceeding by the employer to review a decision of the Industrial Commission granting an award, Held: As to playing basketball, the claimant was not an employee of the company, because the company had no right to control claimant by requiring her to play. Therefore, the injury did not arise out of and in the course of the employment. *Auerbach Co. v. Industrial Commission,* 195 P. 2d 245 (Utah 1948).

Whether an injury suffered by an employee while engaged in a recreational activity sponsored by the employer arose out of and in the course of his employment depends generally on the amount of benefit received by the employer from the activity.[1] It is a general principle of workmen's compensation law that where an em-

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[7]Horovitz, Injury and Death Under Workmen's Compensation Laws 171 (1944).

[6]Ernst v. Morgan, 44 Ariz. 297, 36 P.2d 566 (1934); McFadden v. Compson, 81 Cal. App. 629, 254 P. 622 (1927).

[8]Miss. Laws 1948, c. 354, § 5.

[1]Piusinski v. Transit Valley Country Club, 259 App. Div. 765, 18 N.Y.S.2d 316 (1940); Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, 90 Cal. App. 357, 265 P. 858 (1928); Clark v. Chrysler Corp., 276 Mich. 24, 267 N.E. 589 (1936); Porowski v. American Can Co., 15 N. J. Misc. 316, 191 A. 296 (1937); Pate v. Plymouth Mfg. Co., 198 S.C. 159, 17 S.E.2d 146 (1941); Huber v. Eagle Stationary Corp., 254 App. Div. 788, 4 N.Y.S.2d 272 (1938); Wilson v. General Motors Corp., 70 N.Y.S.2d 109 (1947).

ployee suffers an injury while performing an act for the benefit of the employer, such injury arises out of and in the course of employment..[2] The reason is that, if some advantage results to the employer, the act cannot be regarded as purely personal and unrelated to the employment.[3] If the requisite benefit to the employer is present, the fact that the employee also had a purely personal motive in doing the act is immaterial.[4]

Where an injury is sustained by an employee while using recreational facilities provided by the employer for the purpose of maintaining the morale and increasing the efficiency of the employee, the courts have had difficulty in finding the requisite benefit to the employer.[5] But where the benefit has taken the form of advertising and goodwill, some courts have readily held for the employee.[6] If the employee was compelled or directed to participate in the activity, the injury is compensable.[7] The extent to which the employer supervises participation in the recreational activity,[8] the nature of any privileges given to participants,[9] the amount of financial support given by the employer,[10] and whether such support is charged as a business expense are other factors important to consider in these cases.[11]

The application in the instant case of the "control" test is an innovation.[12] Although the right of control is a factor to consider in determining whether an injury

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[2]Smith v. Seamless Rubber Co., 111 Conn. 365, 150 A. 110 (1930); Lindeman v. Cownie Furs, 234 Ia. 708, 13 N.W.2d 677 (1944); 71 C.J. 675. *See* Whittemore Bros. Corp. v. De Grandpre, 30 So.2d 897 (Miss. 1947), where Mass. rule applied. *Cf.* Primos v. Gulfport Laundry & Cleaning Co., 157 Miss. 770, 128 So. 507 (1930).

[3]Smith v. Seamless Rubber Co., *supra* note 2; Lindeman v. Cownie Furs, *supra* note 2.

[4]Aetna Casualty Co. v. Industrial Commission, 110 Colo. 422, 135 P.2d 140 (1943); Sater v. Home Lumber & Coal Co., 63 Idaho 776, 126 P.2d 810 (1942); Lindeman v. Cownie Furs, *supra* note 2.

[5]*Compare* Dowen v. Saratoga Springs Commission, 267 App. Div. 928, 46 N.Y.S.2d 822 (1944), *with* Clark v. Chrysler Corp., *supra* note 1; Kenny v. Lord & Taylor, 254 N. Y. 532, 173 N.E. 853 (1930), *with* Pate v. Plymouth Mfg. Co., *supra* note 1.

[6]Huber v. Eagle Stationary Corp., *supra* note 1; Le Bar v. Ewald Bros. Dairy, 217 Minn. 16, 13 N.W.2d 729 (1944); Holst v. New York Stock Exchange, 252 App. Div. 233, 299 N.Y.S.2d 255 (1937); Chadwick v. New York Stock Exchange, 252 App. Div. 714, 299 N.Y.S.2d 256. *But cf.* Industrial Commission of Colorado v. Murphy, 102 Colo. 59, 76 P.2d 741 (1938); Tom Joyce 7-Up Co. v. Layman, 44 N.E.2d 998 (Ind. App. 1942).

[7]Stakonis v. United Advertising Corp., 110 Conn. 384, 148 A. 334 (1930); Huber v. Eagle Stationary Corp., *supra* note 1; Salt Lake City v. Industrial Commission, 104 Utah 436, 140 P.2d 644 (1943); Miller v. Keystone Appliances, 133 Pa. Super, 354, 2 A.2d 508 (1938).

[8]Holst v. New York Stock Exchange, *supra* note 6; Puisinski v. Transit Valley Country Club, *supra* note 1.

[9]Wilson v. General Motors Corp., *supra* note 1.

[10]Huber v. Eagle Stationary Corp., *supra* note 1; Le Bar v. Ewald Bros. Dairy, *supra* note 6.

[11]Federal Mutual Liability Ins. Co. v. Industrial Accident Commission, *supra* note 1; Huber v. Eagle Stationary Corp., *supra* note 1; Holst v. New York Stock Exchange, *supra* note 6 (a corporation may not extend largess for stockholders' money).

[12]Piusinski v. Transit Valley Country Club, *supra* note 1; Clark v. Chrysler Corp., *supra* note 1; Porowski v. American Can. Co., *supra* note 1; Pate v. Plymouth Mfg. Co., *supra* note 1; Huber v. Eagle Stationary Corp., *supra* note 1; Wilson v. General Motors Corp., *supra* note 1; Dowen v. Saratoga Springs Commission, *supra* note 5; Kenny v. Lord & Taylor, *supra* note 5; Le Bar v. Ewald Bros. Dairy, *supra* note 6; Holst v. New York Stock Exchange, *supra* note 6; Industrial Commission of

arose out of and in the course of employment, it is usually not controlling.[13] In cases allowing recovery for an injury sustained while going to or returning from the place of employment before or after the hours of employment,[14] and in the "emergency" cases,[15] it is difficult to find a right of control. It would seem that the Utah court has retreated from its previous holdings[16] and has taken a position not in accord with the rule that workmen's compensation statutes are to be construed liberally.[17] That there was such a benefit resulting to the employer in the instant case as to bring it within the usually applied principle seems clear.

Ernest M. Jones

Workmen's Compensation—Lack of Dependents or Others Entitled to Compensation as Condition to Employer's Liability for Contribution to Second-Injury Fund

Employee was killed while in defendant's employ, and his dependents failed to file claim for workmen's compensation within time prescribed by statute. Michigan statute provided that if an employee was killed by injury arising out of and in the course of his employment and left no dependents within the meaning of the act, employer was to pay $1000 into a second-injury fund. Another statute provided that questions of dependency were to be decided at time of injury to deceased employee. This was a proceeding to enforce contribution to second-injury fund. Held: As long as there are persons who were, at the time of employee's death, dependent on him, the employer does not have to make the payment into the second-injury fund. It is immaterial that the dependents were not at time of hearing before compensation commission eligible to receive compensation for the employee's death under the act. *Killion v. E. & L. Transportation Co.*, 321 Mich. 80, 32 N.W.2d 57 (1948).

When an employee has sustained an injury involving the loss of a member of the body and loses another as a result of an industrial injury, he may become permanently and totally disabled, thus increasing disproportionately the amount of workmen's compensation which the employer at the time of the second injury must pay.

Some of the workmen's compensation laws limit the amount to be paid the worker to the usual award that would be paid for an injury of the last type received, regardless of his actual disability resulting from the combined injuries. Under more advanced legislation, however, payment is made for the actual disability resulting from the combined injuries, but if the cost of such compensation is to be imposed upon the

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Colorado v. Murphy, *supra* note 6; Tom Joyce 7 Up Co. v. Layman, *supra* note 6; Stakonis v. United Advertising Corp., *supra* note 7; Salt Lake City v. Industrial Commission, *supra* note 7; Ryan v. State Industrial Commission, 128 Okl. 25, 261 P. 181 (1927); State Young Men's C. Asso. v. Industrial Commission, 235 Wis. 161, 292 N.W. 324 (1940).

[13]Cardillo v. Liberty Mutual Ins. Co., 330 U. S. 469 (1947); Cudahy Packing Co. v. Paramore, 263 U. S. 418 (1923); Horovitz, *Current Trends in Basic Principles of Workmen's Compensation*, 7 Law Society J. 511 (1947).

[14]Standard Paving Co. v. Newman, 194 Okla. 166, 147 P.2d 983 (1944);; Cardillo v. Liberty Mutual Ins. Co., *supra* note 13.

[15]Stilson v. Littlewood, 244 App. Div. 858, 279 N.Y.S. 78 (1935); Herman v. Follmer Trucking Co., 129 Pa. Super. 447, 195 A. 632 (1937).

[16]Cudahy Packing Co. v. Paramore, 60 Utah 161, 207 P. 148 (1922).

[17]Tinsman Mfg. Co. v. Sparks, 201 S.W.2d 573 (Ark. 1947); Goodyear Aircraft Corp. v. Industrial Commission, 158 P.2d 511 (Ariz. 1945).

latest employer, handicapped persons may be refused employment. To meet such problems, "second-injury funds" have been created, so that when a second injury occurs the employer has to pay only for the last injury, yet the employee is compensated for the disability resulting from the combined injuries, the remainder of the award being paid from the fund.[1]

In the majority of states, including Mississippi, these funds are financed by requiring the employer or his insurer to pay a certain sum into the fund in every case of the death of an employee under the act, where there is no person entitled to compensation.[2]

The interpretation of the phrase, "where there is no person entitled to compensation," has been the most controversial point of the provision. Employers and their insurers contend that the determination of who is entitled to compensation should be made as of the time of the death of the employee. The states argue that the hearing before the compensation commission is the proper time and place to determine who, if anyone, is entitled to compensation. However, only in New York and in the Federal courts under the Longshoremen's and Harbor Workers' Compensation Act have there been any appreciable number of decisions on the point. The New York courts have uniformly held that the existence of dependents at the time of the employee's death is no bar to an award to the state treasurer for the second-injury fund, as long as there is no one entitled to compensation at the time of the hearing before the Compensation Commission when such award is made.[3] The other state courts in

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[1]STATE WORKMEN'S COMPENSATION LAWS AS OF JUNE 1, 1946, BULL. 78 at 40 (U. S. Dep't. of Labor, 1947).

[2]Miss. Laws 1948, c. 354, § 31(b), which reads as follows: "In every case of the death of an employee under this act, where there is no person entitled to compensation, the employer shall pay to the commission the sum of five hundred dollars ($500.00) to be deposited with the state treasurer for the benefit of said fund, and the commission shall direct the distribution thereof."

Some other, and perhaps better, methods of financing the funds require that there be paid into the fund: (1) a tax on the premium received by insurance carriers and an equivalent charge on self-insurers (Del., Ky., R. I.); (2) some per cent of compensation paid by insurance carriers and self-insurers during the preceding calendar year (Conn., N. J., N. Y., Okla.); and (3) a legislative appropriation (Cal., Kan., Ore., Pa., Wash.). WORKMEN'S COMPENSATION SECOND-INJURY FUNDS, CHART VIII (U. S. Dep't. of Labor, Div. of Labor Standards, 1947).

[3]Dep't of Taxation and Finance (Norris) v. Thompson-Starrett Co., 271 App. Div. 906, 66 N.Y.S.2d 790 (1946); Harris Structural Steel Co. v. Dean, 45 N.Y.S.2d 821 (1943); *In re* Braun's Estate, 248 App. Div. 843, 290 N.Y.S. 268 (1936); Industrial Comm'r v. Underwood Elliot Fisher Co., 247 App. Div. 658, 282 N.Y.S. 229 (1935), *affirming* 243 App. Div. 658, 276 N.Y.S. 519 (1935), and *aff'd* 271 N.Y. 639, 3 N.E.2d 462 (1936); Matter of Barrett, Executrix v. Burnett, 262 N.Y. 670, 188 N.E. 114 (1933); Matter of Comm'r of Taxation and Finance v. Cox, 258 N.Y. 540, 180 N.E. 324 (1931); Phoenix Indemnity Co. v. Staten Island R.T. Ry. Co., 251 N.Y. 127, 167 N.E. 194 (1929), *aff'd* 281 U. S. 98 (1930); Matter of Chrystal v. United States Trucking Corp., 250 N.Y. 566, 166 N.E. 144 (1929); State Treasurer v. West Side Trucking Co., 198 App. Div. 432, 191 N.Y.S. 346 (1921); Stempfler v. J. Rheinfrank and Co., 190 App. Div. 163, 179 N.Y.S. 659 (1919).

which the question has arisen have supported the New York view,[4] with practically no exceptions.[5]

In the subject case, no proof was adduced showing a recovery from a third party by the employee's dependents, and the award was made by the Compensation Commission only because the dependents had failed to file a claim within the statutory time.[6] The court, in reversing the award, rested its decision on two cases. In the case of *Terminal Shipping Co. v. Branham, Deputy Comm'r*,[7] the decision of the court

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[4]State *ex rel* Wright v. C. C. Anderson Co., 65 Idaho 400, 145 P.2d 237 (1944); State *ex rel* Wright v. Smith, 60 Idaho 316, 91 P.2d 389 (1939); State *ex rel* Parsons v. Workmen's Compensation Exchange, 59 Idaho 256, 81 P.2d 1101 (1938); Inter-Urban Construction Co. v. Industrial Commission, 58 Utah 310, 199 P. 157 (1921). *Cf.* Fallon's Case, 322 Mass. 61, 76 N.E.2d 144 (1947).

[5]William v. Intermountain Fireworks Co., 55 Idaho 28, 37 P.2d 231, (1934); *In re* Stewart, 49 Idaho 557, 290 P. 209 (1930).

Some Federal courts have held that when there is a recovery by the dependents from a third party who is liable for the employee's death, the question of dependency, for the purposes of the act, should be determined as of the time of the employee's death. If the determination of dependency is made at the time of the award by the Compensation Commission, *after* the dependents have become disentitled to receive the benefits of the act by reason of their recovery from the third party, the employer will be compelled to make the payment into the fund, as there will be at that time no one entitled to compensation. Yet he will not be able to take advantage of U. S. Longshoremen's and Harbor Worker's Compensation Act, § 33(c), 33 U.S.C.A. § 933(c), which gives to an employer contributing to the second-injury fund the right of the *legal representative* of the deceased employee to recover damages from a third party liable for the death of the employee. The reason he will not be able to avail himself of this provision is, of course, that the dependents will have already recovered as the legal representatives of the deceased on the same cause of action. Reading together this section and the provision which requires payment into the fund in the first place, the courts reason that Congress did not intend to give the employer an empty protective right of subrogation, and consequently reach the result which avoids this injustice, *i.e.*, by making the determination of dependency as of the time of the employee's death, when there is someone entitled to compensation, thus relieving the employer from the duty of making the contribution at all. Terminal Shipping Co. v. Branham, 47 F.Supp. 561 (1942), *aff'd* 136 F.2d 655 (1943); Federal Mutual Life Insurance Co. v. Locke, 60 F.2d 895 (C.C.A. 2d 1932).

The portion of the Mississippi Act which is equivalent to § 33(c) of the Longshoremen's Act reads as follows: "In the case of liability of the employer or insurer to make payment to the state under the second injury fund provisions, if the injury or death creates a legal liability against a third party, the employer or insurer shall have a right of action against such third party for reimbursement of any sum so paid into the state treasury, which right may be enforced in the action heretofore provided for or by an independent action." Miss. Laws 1948, c. 354, § 30.

It can be seen from the wording of this provision that the employer's right of subrogation, in cases where a third party is liable, is *independent* of the right of action of the employee's dependents. The Federal cases dealing with this point are therefore not applicable in Mississippi, due to the difference in the two statutes. The reasoning which justifies a provision like that in the Mississippi statute is set forth in the Phoenix Indemnity Co. case, note 3, *supra*.

Federal decisions are in accord with the New York rule when no third party liable for the employee's death is involved. Pacific Employers Insurance Co. v. Pillsbury, 88 F.2d 443 (C.C.A. 9th 1937), *affirming* 14 F.Supp. 156 (1936); Employer's Liability Assurance Corp. v. Monahan, 17 F.Supp. 413 (1936); Suckowski v. Norton, 16 F.Supp. 677 (1935).

[6]Killion v. E. & L. Transportation Co., 321 Mich. 80, 32 N.W.2d 57, 58 (1948).

[7]Note 5 *supra*.

was based on the fact that the employee's dependent had recovered from a third party. The case of *In re Stewart*[8] seems to support the view taken by the court in the subject case, but the act under which the Idaho case was decided was amended by the legislature of that state in 1935, the amendment stating, in effect, that failure to file a claim within a year dispenses with the necessity of the state's proving that the deceased employee left no dependents.[9] The legislature, by enacting this amendment showed that it was more cognizant of the ends sought to be achieved than the Idaho court was in interpreting the original statute.[10]

It would appear that the rule devolved by the New York courts, and the Federal courts in analogous situations, is the better solution. Second-injury funds were created to remove the hindrance to those who, having lost a member, sought to become employees under the act. The loss of the second member subjected such an employee's employer to greater liability than he would have otherwise been subjected, and this section was aimed at removing the employer's hesitancy at hiring such handicapped individuals.[11] In view of the broad social purposes for which the act as a whole, and this provision in particular, was enacted, the courts should avoid specious reasoning which would tend to defeat the aims of the legislatures which passed these statutes.

John F. Harrington

Workmen's Compensation—Payment of Medical Expenses as Tolling Statute of Limitations on Claims for Disability Benefits

Employee was injured and received payments for medical aid for eleven months. Six months later he asked court approval of claim for compensation other than medical. Fourteen months later employee filed an amendment to claim, requesting an increased amount. In defense of this amended claim, employer pleaded the Alabama statute of limitations of one year, which also provided: "Where payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from the time of making the last payment."[1] Held: Medical payments are "compensation" within this provision tolling the statute of limitations. *Ingalls Shipbuilding Corp. v. Cahela,* 36 So.2d 513 (Ala. 1948).

The purposes of placing a limitation on the time for giving notice of claim to the employer or for filing a claim with the compensation commission are to terminate finally unasserted rights under the act and to prevent the unnecessary hardship to the employer which would result from unwarranted delay in holding him liable for the injury. Most states hold that voluntary payment of medical benefits to the injured

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[8]Note 5 *supra.*

[9]Idaho Code § 43-1101 (1932) as amended by Laws 1935, c. 147, § 1, as quoted in State v. Workmen's Comp. Exchange, 59 Idaho 256, 81 P.2d 1101, 1102 (1938).

[10]The court in the subject case might have adopted the reasoning of the New York court in the West Side Trucking Co. case, note 3 *supra.* There, the court stated that the failure of the dependents to file a claim was some evidence that she was not a dependent. Certainly such evidence seems as strong as that upon which it was decided in the subject case that there were dependents—the testimony of an insurance adjuster in the pay of the employer of the deceased employee.

[11]State Industrial Commission v. Newman, 222 N.Y. 363, 118 N.E. 794 (1918).

[1]Ala. Code, tit. 26. § 293 (1940).

employee tolls the running of the statute. This is on the assumption that the employer has had sufficient notice of his liability and that there is no need for a claim for compensation when the employee is receiving medical benefits.[2]

There are notable exceptions to this rule, and it would appear from the Mississippi Act that this State is among them.[3]

Other states which do not consider payment of medical benefits as tolling the statute are Michigan,[4] Connecticut,[5] Vermont,[6] Pennsylvania,[7] Tennessee,[8] and Florida.[9]

There seems to be no uniform reason for this variance among the states. However most of the exceptions occur in states which are highly industrialized. Mississippi seems to be the only state which expressly excludes the possibility of considering medical benefits as being compensation for this purpose. Judicial interpretation of the various acts has accounted for exceptions in the other states.

There seems to be no distinction made between the tolling of the period for giving notice[10] to the employer of the injury, and filing of the claim with the commission.[11]

Probably the most liberal extension of a tolling statute has been made by the Missouri Supreme Court.[12] This court held that an agreement by the employer's

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[2]Horowitz, Injury and Death Under Workmen's Compensation Laws 259 (1944).

[3]Miss. Laws 1948, c. 354, § 12, which reads in part: "Regardless of whether notice was received, if no payment of compensation (other than medical treatment or burial expense) is made, and no application for benefits filed with the commission within two years from the date of the injury or death, the right to compensation therefor shall be barred." However, it may be that a different result would be reached when an injured employee asks for a review of his case by the commission under § 21, in part: "The commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, . . . review a compensation case." This section read in the light of § 2(10) which defines compensation as "the money allowance payable to an injured worker or his dependents as provided for in this act, . . ." would seem to indicate that payment of medical benefits would toll the limitation period for seeking a review of a case by the commission.

[4]Brown v. Weston-Mott Co., 202 Mich. 592, 168 N.W. 437 (1918), which held that under the Workmen's Compensation Act an unequivocal claim for compensation must be made within six months, even though the employer has notice of the injury and continues to pay medical expenses.

[5]Simmons v. Holcomb, 98 Conn. 770, 120 A. 510 (1923).

[6]Petroska v. National Acme Co., 95 Vt. 76, 113 A. 536 (1921). Under the Vermont Act payments of compensation must be made voluntarily to toll the statute of limitations. Medical payments are required for the first fourteen days following the injury; hence such payments can not be considered compensation voluntarily paid.

[7]Paolis v. Tower Hill Connellsville Coke Co., 265 Pa. 291, 108 A. 638 (1919), which held that an insurance carrier's payment of surgical, medical, and hospital services under the Workmen's Compensation Act were not "payments of compensation" within the section providing that the limitation for filing claim shall not take effect until one year from last payment.

[8]Tenn. Code § 6874 (Williams, 1934).

[9]Royer v. United States Sugar Corp., 148 Fla. 537, 5 So.2d 692 (1941). The Alabama court in the instant case discussed and criticized this decision.

[10]Industrial Commission v. Globe Indemnity Co., 74 Colo. 52, 218 P. 910 (1923).

[11]London Guarantee & Accident Co. v. Industrial Accident Commission, 92 Cal.App. 298, 268 P. 670 (1928).

[12]McEneny v. S. S. Kresge Co., 333 Mo. 817, 62 S.W.2d 1067 (1933).

insurer to pay the doctor providing medical treatment was such "payment on account of injury" as to postpone the running of the limitation statute, *whether the doctor had actually been paid or not.*

Medical treatment must be furnished at the instance of the employer[13] and not the employee if the statute is to be tolled. This is true even though the employer's doctor is used.[14] However, where the bills were paid by the employer but from a fund to which employees had contributed, it was held to be payment of compensation by the employer so as to toll the statute.[15] Medical payments by the employer were held not to be compensation where he denied liability.[16]

The decision rendered by the Alabama court in the instant case seems not only equitable but practical as the purpose of the limitation statute is served. The employer has notice of the injury and has accepted his liability for it by the payment of medical benefits.

Tom Bourdeaux

Workmen's Compensation—Refusal to Apply Street Risk Doctrine to Salesman Injured Driving Automobile

Plaintiff, traveling salesman, was injured in a traffic accident while enroute from a canvass of his Arkansas territory to his headquarters and home in Vicksburg. The employer was domiciled in Massachusetts, and the contract of employment was executed in that state. He brought this action in the Mississippi court under the Massachusetts Workmen's Compensation Act against his employer and its insurer. That Act[1] provided that the employee shall be paid compensation by the insurer for personal injury arising out of and in the course of his employment, or arising out of the ordinary risk of the street while engaged in the business of his employer. Held: The statute was intended to make compensable injuries arising from the ordinary risks of the street, as well as those injuries arising from risks peculiar to the employment. *Whittemore Bros. Corp. v. De Grandpre,* 30 So.2d 896 (Miss., 1947).

Where the nature of the employment required the employee to use the street, the Massachusetts Court, interpreting its compensation law, has distinguished between injuries which were produced by what it termed ordinary risks of the street and those produced by risks peculiar to the employment. The former did not arise out of the employment as required by the Act.[2] Ordinary risks are

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[13]Buecker v. Roberts, 200 S.W.2d 529 (Mo. App. 1947).

[14]Buda Co. v. Industrial Commission, 306 Ill. 188, 137 N.E. 788 (1922).

[15]Yellow Cab Co. v. Industrial Commission, 315 Ill. 235, 146 N.E. 160 (1925).

[16]Chicago Board of Underwriters v. Industrial Commission, 332 Ill. 611, 164 N.E. 216 (1928).

[1]G. L. (Ter. Ed.) Mass. c. 152, § 26. "If an employee . . . receives a personal injury arising out of and in the course of his employment, *or arising out of the ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth,* he shall be paid compensation by the insurer. . . ." Italicized portion was added to the Act by St. 1927, c. 309, § 3.

[2]Higgin's Case, 284 Mass. 345, 187 N.E. 592 (1933); Hewett's Case, 225 Mass. 1, 113 N.E. 572 (1917).

those encountered by the general public in their use of the street. Any injury resulting from such a risk was not compensable; it was common to the public and not peculiar to the employment.[3] The Massachusetts Act was amended in 1927 to eliminate that doctrine and to make such an injury compensable.[4]

The purpose of the general requirement that the injury arise out of and in the course of the employment is doubtless to insure that there is a causal connection between the injury and the conditions under which the work is performed.[5] The court in *Donahue's Case*[6] says as much; however, it denied compensation to a salesman who slipped on the icy street, because the ordinary citizen had to face the same risk in his use of the street. More in point of fact with the subject case is *Hewett's Case*[7] in which compensation was denied for the reason that: "The danger incident to the use of an auto is not a 'causative danger' peculiar to the work, but a risk which is common to all persons using one."

It appears that the risks of the street, though not peculiar to the work of traveling salesmen, are peculiar to the work of teamsters, truckmen, municipal street employees, and the like.[8] Yet the only difference between these occupations and that of a traveling salesman is in the frequency and extent of exposure to the risk. To allow compensation in the one instance and to deny it in the other because it is a "risk which is common to all persons so traveling"[9] is highly inconsistent. Many modern injuries, excepting occupational diseases, are not at all peculiar to an employee's work but may happen anywhere.[10]

Without legislative amendment, the majority of the states grant awards for injury received from what the Massachusetts Court had termed ordinary street risks.[11] *Schroeder v. Industrial Commission*[12] is representative of the prevailing view as to when the injury arises out of the employment. Because the work cannot be carried on without the employee's being subjected to the risk, the injury grows out of the employment. Or stated differently, a risk is peculiar to the work when it is inseparably connected with and incident to it.

The Mississippi Workmen's Compensation Law states simply that an injury is compensable when "arising out of and in the course of employment."[13] An indication of the construction which the Mississippi Supreme Court is likely to place on this phrase with regard to street risks is to be found in the opinion in

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[3]Colorullo's Case, 258 Mass. 521, 155 N.E. 425 (1927).

[4]See note 1 *supra*.

[5]Horovitz, Injury and Death Under Workmen's Compensation Laws 95 (1944).

[6]226 Mass. 595, 116 N.E. 226 (1917).

[7]225 Mass. 1, 113 N.E. 172 (1917).

[8]Higgin's Case, *supra* note 2; Keaney's Case, 232 Mass. 532, 122 N.E. 739 (1919).

[9]Colorullo's Case, *supra* note 3.

[10]Horovitz, *op. cit. supra* note 5 at 104.

[11]See Note, 80 A.L.R. 126; 51 A.L.R. 509. Parish v. Armour Co., 200 N.C. 654, 158 S.E. 188 (1931); Wahlig v. Krenning-Schlapp Grocer Co., 325 Mo. 677, 29 S.W.2d 128 (1930); Aetna Life Ins. Co. v. Schmiedeke, 192 Wis. 574, 213 N.W. 292 (1927); Capital Paper Co. v. Conner, 81 Ind. App. 545, 144 N.E. 474 (1924); Empire Health & Accident Ins. Co. v. Purcell, 76 Ind. App. 551, 132 N.E. 664 (1921); J. E. Porter Co. v. Industrial Commission, 301 Ill. 76, 133 N.E. 652 (1921).

[12]169 Wis. 567, 173 N.W. 328 (1919). (Recovery allowed salesman who slipped on street.)

[13]Miss. Laws 1948, c. 354, § § 2(2), 4.

the instant case. It cites with approval *Cahill's Case,*[14] in which compensation was awarded without regard to the amending phrase "arising out of an ordinary risk of the street." The court also recognizes as similar in principle the determination of whether an employee's action was within the scope of his employment and whether an injury arose out of the employment. It indicates, by citing a Mississippi decision,[15] that if injury to a third person through an employee's negligent use of an automobile places liability on the master because it is the result of an activity immediately incident to the employment, then by analogy, injury to the employee should be compensated for.

If injury occurred during the course of the employment and was occasioned by exposure to a risk inseparably connected with or reasonably related to the conduct of the job, it should be compensable within the statute.

Louis J. Lyell

Workmen's Compensation—Whether Violation of Statute Bars Compensation as Being Beyond the Course of Employment

Employee, general superintendent for the plaintiff corporation, was killed in a truck accident while directing the moving of building materials to be used in employer's business. Employee's son, age fourteen, was driving at his father's request, although he was not an employee of the plaintiff, and did not have a driver's license. Employee was authorized to do and to supervise such trucking jobs. Employer contended that compensation could not be had because employee had departed from the course of his employment by allowing his son to drive, which was in violation of a statute. Held: Violation at the time of the accident of a statute which refers only to the manner in which the act or service was performed does not remove the employee from the "course of employment." *M & K Corp. v. Industrial Commission,* 189 P.2d 132 (Utah 1948).

The courts apply an alternative test in determining whether the violation of a rule of the employer or of a statute takes the employee out of the limits of his employment. They inquire whether the rule or statute which was violated limited the course of such employment, or, on the other hand, whether it was merely a direction not to do certain acts or to do them in a certain way.[1] If the rule or statute relates only to the manner in which the task is to be performed by the employee, it is usually held that he has not left the course of his employment when he adopts a forbidden method to accomplish authorized results.[2] Because the courts have had difficulty in assigning particular cases to their proper category when applying this test, the decisions are not consistent.

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[14]265 Mass. 538, 4 N.E.2d 332 (1926).
[15]Caver v. Eggerton, 157 Miss. 88, 127 So. 727 (1930).

[1]*See* Note, 23 A.L.R. 1161 (1921); Schneider, Workmen's Compensation § § 1598-1603 (1948); Horovitz, Current Trends In Workmen's Compensation 620-622 (1947), for a discussion of this problem.

[2]Auto Lite Corp. v. Industrial Accident Commission, 77 Cal. App.2d 629, 176 P.2d 62 (1947); Ricci v. Katz, 267 App. Div. 928, 46 N.Y.S.2d 781 (1944); Prentice v. Twin City Grocery, 202 Minn. 455, 278 N.W. 895 (1938); Travelers Insurance Co. v. Burden, 94 F.2d 880 (C.C.A. 5th 1937); Moss v. Hamilton, 234 Ala. 181, 174 So. 622 (1937); Standard Elkhorn Coal Co. v. Stidham, 242 Ky. 228, 46 S.W.2d 120 (1931).

Those courts which have denied compensation because of some infraction of the rules of the employer or of a statute have usually come to this result by reasoning that the disobedient conduct of the employee was so serious and wilful that it took him beyond any reasonable scope of his authority. Therefore, the injury or death did not arise in the course of his employment.[3] This is particularly true when the violated rule or statute limited the work which the employee was to perform,[4] or the place in which he was to perform it.[5] The compensation acts in most states have express provisions which deny compensation or reduce it when the act of the employee which results in his death or his injury was caused by the wilful misconduct, or by the intoxication of the employee, or by his wilful intention to injure or kill himself.[6] The Mississippi Statute has such a provision.[7] Even in the absence of such express provisions, however, compensation has been denied when it is shown that the employee's conduct took him out of the course of his employment.[8]

But in deciding whether the misconduct of the employee took him outside the scope of his employment, the courts seem to agree that mere negligence, however great, does not constitute such conduct.[9] It has also been said that the unintentional violation of a rule, order, or statute is merely negligence on the part of the employee; and that his negligence does not deprive him or his dependents of the benefits of the workmen's compensation act.[10] The defenses of negligence and assumption of risk, which were formerly available to the employer, were supposedly abolished by compensation acts. Hence compensation awards are also justified by giving the violation of rules or of statutes only the effect of negligence on the part of the employee.[11]

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[3]Kozak v. Reilly Coal Co., 141 Pa. Super. 413, 15 A.2d 531 (1940); Bugh v. Employers' Reinsurance Corp., 63 F.2d 36 (C.C.A. 5th 1933); Shoffler v. Lehigh Valley Coal Co., 290 Pa. 480, 139 A. 192 (1927); Fortin v. Beaver Coal Co., 217 Mich. 508, 187 N.W. 352 (1922); Morris & Co. v. Industrial Commission, 295 Ill. 49, 128 N.E. 727 (1920).

[4]Kozak v. Reilly Coal Co., *supra* note 3; Cohen v. Birmingham Fabricating Co. 224 Ala. 67, 139 So. 97 (1932); Shoffler v. Lehigh Valley Coal Co., *supra* note 3.

[5]Anderson v. Russell Miller Co. 196 Minn. 358, 267 N.W. 501 (1936); Cacesa v. Consumers' Power Co., 220 Mich. 338, 190 N.W. 279 (1922); Smith v. Corson, 87 N.J.L. 118, 93 A. 112 (1915).

[6]Iowa Code, c. 85, § 85.16 (1946) (willful intent to injure himself, intoxication); Ala. Code, tit. 26, § 270 (1940) (wilful misconduct, intention to bring about injury or death of himself, intoxication, wilful failure or wilful refusal to use safety appliances, refusal or wilful neglect to perform a statutory duty, wilful violation of a law, wilful breach of a reasonable rule or regulation of his employer); Tenn. Code Ann., c. 43, § 6861 (1934) (wilful misconduct, intentionally self-inflicted injury, intoxication, wilful failure or refusal to use a safety appliance or perform a duty prescribed by law).

[7]Miss. Laws 1948, c. 354, § 4 (intoxication of employee or by the wilful intention to injure or kill himself).

[8]Fournier v. Androscoggin Mills, 120 Me. 236, 113 A. 270 (1921); Harris v. Kaul, 149 Minn. 428, 183 N.W. 828 (1921).

[9]Smith v. Industrial Accident Commission, 18 Cal.2d 843, 118 P.2d 6 (1941); Griffith v. Coal Co. 229 Iowa 496, 294 N.W. 741 (1940); Glass v. Sullivan, 170 Tenn. 230, 94 S.W.2d 381 (1936); Gignac v. Studebaker Corp. 186 Mich. 574, 152 N.W. 1037 (1915).

[10]Fliteways Inc. v. Industrial Commission, 249 Wis. 496, 24 N.W.2d 900 (1946); Day v. Gold Star Dairy Co., 307 Mich. 383, 12 N.W.2d 5 (1943); Griffith v. Coal Co., *supra* note 9.

[11]Sloss-Sheffield Steel & Iron Co. v. Nations, 236 Ala. 571, 183 So. 871 (1938); Western Pac. R. R. v. Industrial Accident Commission, 193 Cal. 413, 224 P. 754 (1924); Callihan v. Montgomery, 272 Pa. 56, 115 A. 889 (1922); Dzikowoka v. Superior Steel Co. 259 Pa. 578, 103 A. 351 (1918).

In determining whether or not compensation should be awarded, it can be seen that the courts have not considered the fault of the employee as controlling. Instead, they have looked to the statutory requirement that provides for compensation only when the disability or death of the employee arises out of "and" in the course of his employment. A majority of the states require both these elements to be proved,[12] but in the instant case, the Utah Statute provides that the injury need only arise in the course of "or" out of the employment.[13] In answering the ultimate question, whether the injury arose out of and in the course of the employment, the courts chiefly consider: (1) whether the rule or statute violated related only to the manner of performing the job or whether it limited the scope of employment;[14] and (2) whether the conduct of the employee was so wilful and intentional as to take him beyond the scope of his employment.[15] Consideration is also given to: (3) whether or not the particular act which resulted in the injury or death of the employee was of benefit to the employer;[16] and (4) whether the rule or statute violated was the proximate cause of the injury.[17]

William J. Hamm

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[12]SCHNEIDER, WORKMEN'S COMPENSATION STATUTES, 3902 (1939).

[13]UTAH CODE § 42-1-43 (1943); Twin Peaks Canning Co. v. Industrial Commission, 57 Utah 589, 196 P. 853 (1921).

[14]*See* note 1 *supra.*

[15]*See* note 3 *supra.*

[16]Day v. Gold Star Dairy, *supra* note 10; Macechko v. Bowen Mfg. Co., 179 App. Div. 573, 166 N.Y.S. 822 (1917).

[17]Kimball's Case, 132 Me. 193, 168 A. 871 (1933); Wood v. Snyder, 83 Ind. App. 31, 147 N.E. 314 (1925); Bourne v. Whitman, 209 Mass. 155, 95 N.E. 404 (1911). As an analogy, there is the well established principle in accident and life insurance cases wherein the insurer must show that the claimed violation of law was the cause of the insured's injury, and that the injury would not have occurred unless the insured had been violating the law. Lamar Life Ins. Co. v. Bounds, 200 Miss. 314, 25 So.2d 707 (1946), Baker v. Supreme Lodge K.P., 103 Miss. 374, 60 So. 333 (1912).

RECENT BOOKS

This department undertakes to note or review briefly current books on law and matters closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publisher's literature, and the ordinary library sources. The information given in the reviews is derived from a personal reading of the book by the individual whose name appears at the bottom of the review.

BRIEF REVIEWS

ADEQUACY OF WORKMEN'S COMPENSATION. By Arthur H. Reede; Cambridge, Massachusetts, Harvard University Press, 1947, pp. 422. $5.00.

A. H. Reede was invited in 1937 by the Harvard University Committee on Research in the Social Sciences to make a study of industrial accident insurance in the United States. The field work for this project was done between 1937 and 1939. After a tour of duty in the U. S. Army, the author made necessary revisions in the text and presented it for publication. Reede is Professor of Economics and also Labor Advisor to the Bureau of Business Research at Pennsylvania State College. He has written several texts in the field of insurance.

Much of the literature on workmen's compensation is highly colored by strongly partisan points of view. This book, however, argues that accident and health hazards in industry are in an area in which the proportion of common interests of employers and employees is unusually large, and in which considerations of public welfare are highly important. In his detailed consideration of the adequacy of the several workmen's compensation laws of the states (Mississippi is not included) and the Federal Government, Reede gives the facts and discusses their significance in relation to the employments and injuries covered by these laws. He also presents the existing inadequacies discovered, both in relation to the cost of insuring benefits and to the movement for preventing industrial injuries.

The book is broken into six separate parts in order to better accomplish its purpose. Part 1 is devoted to an analysis of the expanding scope of workmen's compensation. This is essentially a study of the coverage of the workmen's compensation laws, with the trends spotlighted and inadequacies explored. Part 2 concerns itself with an analysis of the benefit scale. Here the author investigates and compares the compensation benefits allowed by the various laws for the several degrees of disability. Part 3 delves into a study of the proportion of wage loss compensated. Part 4 provides a statistical discussion of the cost of workmen's compensation insurance. At this point Reede gives a highly technical discussion of the problems involved and suggests methods whereby costs might be lowered. Part 5 is somewhat of a continuation of this, but concerns itself more with the relation between injury prevention and compensation costs. Detailed analysis is made of the safety movement engineered by each of the social units concerned—employers, labor organizations, insurance carriers, and regulatory agencies. Part 6, as a conclusion, attempts to acknowledge recent changes in workmen's compensation laws and workmen's compensation insurance and to place these changes in their proper place within the major trends spot-lighted previously.

Adequacy of Workmen's Compensation is an extremely well written, but highly technical work. It is not recommended for light reading, but if anyone is closely connected with workmen's compensation, this book should prove helpful. It gives facts; it gives figures; it points out trends; it makes comparisons; and it offers suggested solutions to the problems uncovered. As a result of thorough and detailed research, the author has presented a difficult subject in an admirable manner.

*Frank E. Shanahan, Jr.**

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*Attorney at Law; Vicksburg, Mississippi.

CURRENT TRENDS IN BASIC PRINCIPLES OF WORKMEN'S COMPENSATION. By Samuel B. Horovitz. 18 Tremont Street, Boston, Massachusetts, The Law Society of Massachusetts, 1947, pp. 167. Paper binding, $2.00; cloth binding, $3.00.

Drawing on his many years of experience as workmen's compensation attorney for laborers, for the Boston Legal Aid Society and the Massachusetts State Federation of Labor, Samuel B. Horovitz prepared an article dealing with the growth and development of the basic features of workmen's compensation statutes in this country and England. It appeared in the May, August and November, 1947 issues of *The Law Society Journal* and has not been compiled into one volume from the original plates.

The history and growth of compensation acts is reviewed in a brief introductory section of the article. The common law rule of the master's liability to the servant for injury caused by the fault of the master, with the later exceptions based on the fellow-servant and assumption-of-risk doctrines, gave place, with the increasing industrialization of England and the United States, to the concept of liability without fault for injury dependent on a relationship to the job. Strict construction, both from a standpoint of constitutionality and application of the statutes, has given way gradually to a liberal construction and application in most jurisdictions.

Horovitz then takes the phrase "personal injury by accident arising out of and in the course of the employment," which is found in most of the compensation statutes, and, breaking the phrase into component parts, proceeds to annotate the statute by discussion and citation.

The article suffers from the limitation imposed on any author discussing the construction of statutes that are not uniform, but vary from state to state in wording, and necessarily in application. However, the discussion points up the myriad problems that can arise in arriving at the legislative intent and applying that intent to the practical solution of actual problems, and it does indicate the trend in judicial decision and legislative change in the solution of many vexatious situations.

Early in the application of the workmen's compensation laws, the question arose of just what "personal injury" means. In 1910, for example, the Kings Bench courts were called on to decide whether a worker has suffered a personal injury who was disabled because of nervous shock from seeing a fellow worker in an accident; it found that he had. Since then numerous cases of nervous collapse, occupational disease, ordinary disease and non-traumatic injury have been before the courts.

The accidental nature of injury suffered has also come in for considerable consideration by the courts. Possibly the most troublesome of these questions deals with the occupational and non-occupational disease groups and the unusual results of ordinary work.

The longest section of Horovitz's pamphlet is concerned with the words "arising out of," involving (as that condition precedent to compensation does) the question of the relation of employment to injury. The author deplores the early application of common law principles of "scope of employment," "proximate cause," "intervening cause," and similar legal concepts to compensation statutes, and applauds the liberal current trend away from such application. The modern definition of "arising out of," as he gives it, is this: "an injury arises out of the employment if it arises out of the nature, conditions, obligations, or incidents of the employment; in other words, out of the employment looked at in any of its aspects." But this still leaves many unanswered questions. For instance, what of the worker killed by lightning? Suppose his work required that he stand under a wet tree, or otherwise expose himself? On the other hand, what if his exposure to risk had no relation to his work, but nevertheless he was working at the time he was injured?

Probably in the "arising out of" cases, more than any other, Horovitz is critical of the courts, because he feels that they lean too much on outmoded common law thinking of causation, and because, he charges, they have by judicial application amended the compensation acts by such doctrines as that of "added risk." After brief discussion of the "course of employment," and the application

of those words to actual situations, the author concludes with a plea for a generally more liberal construction of the compensation statutes in favor of the workman.

This article, as the name indicates, traces the current trends in compensation law application, based on the heart of the compensation statutes. For the student of the subject, it is a valuable work; for the judge or commissioner who must apply the statute, it may be of value as an index to comparative modern trends and the historical background of present-day applications of the law; for the practicing lawyer, it may prove helpful as background material and, in a limited way, as a source of citations. It will not serve as a hand brief or a digest, because it is not so designed. It is primarily a critical appraisal of modern judicial thought and a plea for further liberalization. *Leslie F. Darden**

SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS. By William B. Wright. New York, Central Book Co., 1948, pp. 161. $7.50.†

A point on which the Bar and industry might agree is that the development and enactment of workmen's compensation laws in the various states have proved one of the most salutary steps for both. Although every state now has such an act,[1] they differ widely in their application, and particularly in the provisions for the recovery by the employer of the amount paid as compensation from a third person whose negligence caused the injury. Mr. Wright has performed a valuable service to lawyers and to legislators by compiling this first study in the field of the comparative subrogation provisions of the various workmen's compensation laws. His position as acting chief attorney for the Federal Security Agency, Bureau of Employees' Compensation, qualifies him for such a task.

Mr. Wright's method of dealing in a brief space with such a vast amount of material is to draw parallels between the laws of the states on the subject, and then in the text to attempt to deduce the generalities, coordinating both the majority and minority rules with actual decisions by means of full footnotes. Not the least valuable feature of the book is an analytical table summarizing the subrogation provisions of each state and territory, and an appendix in which these provisions are set forth in full. Collection of this material in a convenient form should prove helpful to counsel for insurance companies which write compensation insurance in numerous states.

But the chief interest of the book to the average lawyer is to emphasize the many problems and discrepancies which still exist in the law of workmen's compensation. If the employer is completely subrogated to the employee's rights, and sues in his name or its own, what disposition is to be made of the amount recovered? Mr. Wright points out that the modern tendency is to be more liberal towards the employee, and that in Arkansas and Wisconsin he is entitled to receive one-third and in New York two-thirds of the net recovery. Should contributory negligence on the part of the employer bar his right to recover from a third party under the subrogation feature of the act? The decisions have gone both ways. Does the acceptance of compensation under acts providing for an election bar a subsequent action against an attending physician for malpractice aggravating the injury? Again there are cases on both sides. These are only a few of the problems which deserve the consideration of the Bar, and which sooner or later must be definitely settled. Perhaps uniform legislation is indicated; perhaps as the law of workmen's compensation develops, the courts will bring the decisions of the states into line. In any event the present work is an admirable preliminary study which should prove of interest and great help in any consideration of its subject. *Walter P. Armstrong, Jr.***

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[1]Mississippi was the last state to adopt such legislation, which was enacted during 1948 and was too late to be considered in the present volume.

†This book review is reprinted from 34 A.B.A.J. 571 (1948), with permission of the publisher and author.

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STATE WORKMEN'S COMPENSATION LAWS. Bulletin No. 78, U. S. Department of Labor, Division of Labor Standards, U. S. Government Printing Office, 1946, pp. 45.

DISCUSSION OF INDUSTRIAL ACCIDENT AND DISEASES. Bulletin No. 94, U. S. Department of Labor, Division of Labor Standards, U. S. Government Printing Office; 1948, pp. 219. 40c.

The practicing attorney and the law student will find little of interest in these two bulletins. The first is nothing more than a recital of statistical information, as of June 1, 1946, revealing the wide variation in respect to substantive benefits provided among the several states. It further purports to show alleged inadequacies of protection existing as of the date hereinabove mentioned. It may perhaps be of some interest to the inquisitive legislator, administrators of the various acts, insurance carriers and the like. Of its generalized statements the definition of an occupational disease was one that struck this reviewer as particularly absurd: "An occupational disease is usually held to be an injury of gradual or slow development, by comparison with the sudden effect of an accident."

Bulletin No. 94 is of more general interest. It is a report of the thirty-third annual meeting of the International Association of Industrial Accident Boards and Commissions held at Toronto, Ontario, Canada in the fall of 1947. Primarily it consists of addresses delivered at this meeting and they might well be grouped as follows: (a) addresses delivered by physicians and surgeons with respect to special medical problems in the compensation field—the address of Dr. J. R. Card, "Compensation Problems Presented by Industrial Skin Conditions" being superior; (b) safety education addresses; (c) common problems facing the administrators of the various compensation acts, *e.g.*, rehabilitation service for industrial casualties; and (d) special committee reports.

Our legislature will be requested from time to time to include occupational diseases within the provision of our statute. The Chairman of the Virginia Industrial Commission gave an interesting report on his state's experience in Bulletin 94, on "Virginia's Experience with Occupational Disease Law."

For an able presentation of our own statute, a comparison of its provisions with those of other states, and for an excellent discussion of many of the problems which will necessarily arise, it would be well for the practitioner and the student to study thoroughly Satterfield's "An Introduction to the Mississippi Workmen's Compensation Act."[1] Leave the bulletins here reviewed for the administrators and the Government Printing Office!

*David C. Welch**

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[1]20 MISS. L.J. 27 (1948).

BIBLIOGRAPHY

The many requests already received from members of the Mississippi Bar by faculty members of the University of Mississippi Law School reveal the need for a bibliography of useful books on the subject of workmen's compensation law. It is hoped that this brief bibliography will be helpful in filling this need.

ADEQUACY OF WORKMEN'S COMPENSATION. By Arthur H. Reede. Cambridge, Massachusetts, Harvard University Press, 1947, pp. 422. $5.00.

ADMINISTRATION OF WORKMEN'S COMPENSATION. By Walter F. Dodd. New York, The Commonwealth Fund, 1936, pp. 845. $4.50.

ANALYSIS OF PROVISIONS OF WORKMEN'S COMPENSATION LAWS AND DISCUSSION OF COVERAGE. Washington, D. C., prepared by the Insurance Department, Chamber of Commerce of the United States, January, 1948, pp. 50.

CURRENT TRENDS IN WORKMEN'S COMPENSATION. By Samuel B. Horovitz . 18 Tremont Street, Boston 8, Mass., The Law Society of Massachusetts, 1947, pp. 180. Paper binding, $2.00; cloth binding, $3.00.

FEDERAL LIABILITIES OF CARRIERS. By Maurice G. Roberts. 2d ed. by Francis A. Darnieder and William W. Culver. 2 vols. Chicago, Callaghan and Company, 1929, pp. 2137. $25.00.

INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS. By Samuel B. Horovitz. · 32 Derne Street, Boston, Massachusetts, Wright and Potter Printing Co., 1944. pp. 486. $6.00.

NATIONAL ASSOCIATION OF CLAIMANTS' COMPENSATION ATTORNEYS LAW JOURNAL. Published biennially. 1089-91 Tremont St., Boston, Massachusetts, The Lavalle Press. Vol. 1, No. 1 (May 1948), and Vol. 2, No. 1 (Nov. 1948). Single copy $3.00. Annual subscription $5.00.

PRACTICE AND PROCEDURE UNDER THE MASSACHUSETTS WORKMEN'S COMPENSATION LAW, WITH FORMS. By Samuel B. Horovitz. Boston, Massachusetts, E. W. Hildreth, 2d ed. 1930, pp. 176. $4.50.

SOUTH CAROLINA WORKMEN'S COMPENSATION ACT ANNOTATED. By Ernest B. Castles. Box 575, Anderson, S. C., E. W. Castles, 1947, pp. 180. $10.00.

STATE WORKMEN'S COMPENSATION LAWS AS OF JUNE 1, 1946. Washington, D. C., Bulletin No. 78, United States Department of Labor, Division of Labor Standards, 1946, pp. 45.

SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS. By William B. Wright. 261 Broadway, New York 7, N. Y., Central Book Co., 1948, pp. 161. $7.50.

WORKMEN'S COMPENSATION. By Wm. R. Schneider. 16 vols. (estimated), 10 vols., 6 text, 4 statutes, now published, supplemental yearly pocket part service. St. Louis, Mo., Thomas Law Book Co., 1939-1948. $12.00 per volume.

WORKMEN'S COMPENSATION INSURANCE, PRINCIPLES AND PRACTICE. By Douglass Argyle Campbell. 2 vols. Los Angeles, Parker, Stone and Baird Co., 1935, pp. 2059. $25.00.

WORKMEN'S COMPENSATION LAW IN LOUISIANA, A CASE STUDY. By Marian Mayer. Baton Rouge, Louisiana, Louisiana State University Press, 1937, pp. 253. $2.00.

WORKMEN'S COMPENSATION LAW REPORTER. Published by Commerce Clearing House. 214 N. Michigan Ave., Chicago 1, Illinois, Commerce Clearing House, 1947-1948. 1949-1950. Looseleaf. $45.00 annually.

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